In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,

Petitioner,

v.

STATE OF UTAH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF BY RESPONDENT STATE OF UTAH

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INTRODUCTION

Approximately fifteen years ago, the State of Utah began selecting certain lands believed to contain oil shale deposits, as indemnity for school land grants in place (base lands) which the State never received because of federal pre-emption or private entry prior to

the time that title otherwise would have passed to the State.[1]

The Secretary of the Interior has not yet determined whether these school indemnity selections are in compliance with the criteria of the school indemnity selection statute (43 U.S.C. §852), but has declared that he will reject these selections if in his opinion the selected lands are substantially more valuable than the base lands—even though such conduct would be clearly contrary to Utah's Enabling Act and to the school indemnity statute, which require that lands selected must be of equal acreage to the lost base lands for which selection is made. The Secretary argues that Section 7 of the Taylor Grazing Act (43 U.S.C. §315f) authorizes him to so circumvent the school indemnity selection statute.[2] The trial court and the court below rejected that argument.

[1] The Ute Indian Tribe filed a Motion for leave to intervene or, in the alternative, to file a Brief amicus curiae in this case. The Secretary of the Interior filed a Memorandum in response to that Motion, fully and effectively demonstrating that there is no basis or justification for the Tribe either to intervene or appear as amicus curiae. The State of Utah endorses and adopts the Memorandum filed by the Secretary of the Interior, except to the extent that the Secretary claims in that Memorandum that he has authority to classify school indemnity selections pursuant to the Taylor Grazing Act.

The pertinent point is that whatever interests the Ute Indian Tribe may have in a determination of the present exterior boundaries, if any, of the Uncompahgre Indian Reservation is now in litigation in the Federal District Court in Utah, and will in no way be prejudiced by this action now pending before this Court. If the Tribe feels aggrieved by any future judicial determination of any federal question concerning the original Uncompahgre Indian Reservation it will have an opportunity in due course to request this Court to review any such determination. But that time has not come.

[2] In this Brief, the State of Utah is frequently critical of various legal positions asserted by the Secretary of the Interior. It is only fair to say, however, that the Secretary of the Interior did not request certiorari in this case. He evaluated the potential impact of outstanding school indemnity selection rights, as held by the seven States still having such rights, on federal management of the public domain, and was content to live with and abide by the decision of the lower court. He therefore notified the Justice Department that he did not desire any petition for certiorari, but he was overruled by the Justice Department.

Utah concurs in the statements by the Secretary with respect to "Jurisdiction" and "Statutes Involved" (pp. 1-2 of the Secretary's Brief), but believes that the "Questions Presented" make inaccurate assumptions. For example, the Secretary assumes in Question No. 1 (p. 2 of Secretary's Brief) that lands included within grazing districts are "withdrawn from all forms of private appropriation." This is not true, since the Taylor Grazing Act expressly exempts mining entries and appropriations (43 U.S.C. §315f). Further, it is inaccurate to assume that school indemnity selections by a State for the support of public schools are "private appropriations" of public lands.

The real question in this case is whether Congress has conferred on the States the *right to select* unappropriated federal mineral land as indemnity for lost mineral school sections in place, or whether Congress has given the Secretary of Interior unbridled discretion to approve or reject such selections for whatever reasons he deems appropriate. Utah contends that this Court has clearly held that the right of selection is in the States, and that the Secretary has no discretionary authority beyond that of making an administrative adjudication to determine whether the selections are in accordance with the criteria set forth in the school indemnity selection statute (43 U.S.C. §852).

Referring to *Wyoming v. United States*, 255 U.S. 489 (1921), and *Payne v. New Mexico*, 225 U.S. 367 (1921), the lower court concluded ". . . we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah." (586 F.2d 756, 769).

SUMMARY OF ARGUMENT

Federal land grants to the States for the support of the common schools create a solemn public trust of critical importance for the support of public schools. This trust is in the nature of a bilateral compact whereby Utah, as a sovereign State admitted into the Union on an equal footing with the Original States, agreed not to tax federal lands within Utah, and whereby the United States, for its part, granted four sections of federal lands within each township to Utah for the aid and support of the public schools, thus compensating Utah for the limited and reduced property tax base available to raise revenues to support governmental functions (specifically, the operation and maintenance of the public school system).

By clear and unambiguous legislation, Congress not only granted and appropriated lands for the original school sections in place, but further provided that whenever title to any such school section did not pass to Utah because of federal pre-emption or private entry prior to survey, Utah could select, at its option, an equal acreage of unappropriated federal lands (28 Stat. 109 §6; 43 U.S.C. §852). The congressional grant was

in the nature of an offer which Utah could accept or exercise at its election and discretion; and, when so exercised through the filing of school indemnity selection lists, the Secretary of the Interior is obligated by law to conduct an administrative adjudication to determine whether such indemnity selections are in compliance with the enabling act and the statutory criteria set forth by Congress in 43 U.S.C. §852.

If there is such compliance, Utah receives equitable title to the selected lands as of the date that the respective indemnity selection lists were filed, and the Secretary must approve such selections by issuing what is commonly referred to as a "clear list," and legal title thereupon vests in Utah.[3] If the selection lists are not in compliance with the applicable statutory criteria, equitable title does not vest in the State by virtue of filing such selections, and the Secretary is obligated to reject such selections.

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[3] The Secretary repeatedly claims in his Brief that he has unlimited discretion to approve or reject school indemnity selections. Such a view implies that if he approves a school indemnity selection, that he then would issue some deed or other document with words of conveyance in order to transfer title to the State. But that is not the case. Title passes directly by virtue of the appropriation and commitment made in the Enabling Acts and by virtue of the grant and appropriation made in 43 U.S.C. §§851-852.

The Secretary merely issues a "clear list" after he completes his ministerial adjudication, and this is no more than an acknowledgment that the statutory criteria of 43 U.S.C. §852 have been satisfied by the school indemnity selection identified in the clear list. As this Court held in **Wyoming v. United States**, supra, equitable title to the land selected vests in the State at the date of selection, and the "clear list" has the effect of perfecting fee title in the State. (See 43 U.S.C. §859). Clear lists never contain any language purporting to convey or grant title, as would a patent or other instrument of conveyance. The Secretary never has, and does not now, issue "patents"—he merely certifies by a clear list. By contrast, the Secretary must issue patents when state lands are exchanged for federal lands. 43 U.S.C. §315g(3).

The Secretary of the Interior has no authority to substitute a comparative value criterion in lieu of the equal acreage criterion mandated by Congress. Nor does he have separate and independent authority under Section 7f of the Taylor Grazing Act, 43 U.S.C. 315f, to "classify" all lands within a grazing district to determine whether they are "proper" for school indemnity selections, a process whereby he claims he may consider a wide range of public interest factors, including the comparative values of the base school lands and the selected indemnity lands, and "classify" the land for retention in federal ownership if in his personal view he does not think the public interest would be served by allowing title to pass to the State.

Even if it be assumed, *arguendo*, that the Secretary has authority to classify the suitability of land for school indemnity selection, the classification criteria would be those set forth in 43 U.S.C. §852, and would not include a comparative value criterion.

The court below held that the Secretary's arguments were based on a strained and wholly irrational construction of a 1936 Amendment to the Taylor Grazing Act and Executive Order No. 6910 as his claimed source of authority for frustrating the clear mandate of Congress under the school indemnity selection statute, and concluded there is absolutely no indication in the legislative history of the Taylor Grazing Act, or in the Act itself, that Congress intended to require or authorize "classification" under Section 7 as a condition to a State's exercise of its school indemnity selection rights.

The court also noted that this Court has clearly held that school indemnity selection rights are to be exercised in the discretion of the States—not the Secretary of the Interior. By contrast, the Secretary cited no case in any jurisdiction that has ever held that the classification procedures of the Taylor Grazing Act apply to school indemnity selections; and the Secretary has also admitted that he previously had always recognized that school indemnity selections must be on an acre-for-acre basis and that he had *never* applied the "comparative value" criterion to school indemnity selections.[4]

The court below also noted that this Court held in *Wyoming v. United States, supra*, that the very act of *filing* the school indemnity selection lists operates as a release, waiver and relinquishment by the State of any further claim to the original school sections in place, and the State receives in lieu thereof equitable title to the selected lands. This is a form of equitable conversion, because the filing of the selection lists results in a simultaneous payment in full to the United States for the selected lands, and no other or further act is required by the State to complete the transaction. The only remaining act is the administrative adjudication to be conducted by the Secretary of the Interior.

ARGUMENT

I. SCHOOL LAND GRANTS DERIVE FROM

[4] To keep this case in perspective, it is important to realize that the oil shale reserves covered by Utah's school indemnity selections in this case constitute only a fraction of one percent of the oil shale reserves located in the "Three Corners" region. See Section VI.C of this Brief.

A BILATERAL COMPACT AND CREATE A SOLEMN PUBLIC TRUST

A. *Public Trust Nature of School Land Grants*

1. *Introduction*

The Secretary views indemnity selections for school land grants in place as a congressional authorization for him to decide—based on his personal notions of public policy—when, whether and to what extent such selections should be approved. This is a mistaken view. Unlike most federal land grants, school land grants are made in trust to create a permanent fund for the support of the public school system of the State. This trust is extremely important and involves fundamental concepts of equal footing, sovereign governmental functions, and bilaterial compact between sovereigns. Since the Secretary seeks to emasculate this public trust though his personal notions of public policy, it seems important to quote part of the lower court's summary of the nature of this trust:

> The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.
>
> There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories.

> The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. *It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states.* The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.
>
> Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. Alabama v. Schmidt, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. State of Nebraska v. Platte

> Valley Power and Irr. Dist., 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands. The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of preexisting rights of others. McCreedy v. Haskell, 119 U.S. 327 (1886). (586 F.2d 756, 758; Emphasis in Opinion).

2. *Equal Footing*

States admitted into the Union are accorded equal footing with the Original States, and the respective enabling acts so provide. The status of equal footing is not merely a matter of congressional grace, but is a fundamental constitutional requirement. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Utah*, 283 U.S. 64 (1931).

The requirements of "equal footing" extend beyond equality in sovereign power and regulatory authority, and include a measure of state-owned property rights (see *Smith v. Maryland*, 18 How. 71 (1855); and *United States v. Texas*, 339 U.S. 707 (1950)). Of course, th s does not mean that each State must have an equal area or equal value in property, but merely that each State shall be accorded equivalent treatment under consistent and uniform principles.

In *United States v. Morrison*, 240 U.S. 192, 205 (1916), this Court considered a school land grant to Nevada, and emphasized that all school land grants should be considered on an equal footing. To the same effect is *Heydenfelt v. Daney Gold & Silver Min. Co.*, 93 U.S. 634, 638 (1876).

As the lower court observed, with respect to revenues to support public schools, equal footing is achieved by a congressional grant designed to produce a fair and just settlement with the newly-admitted State in lieu of immunity from taxation of federal lands within the State, and by acceptance of the grant and the attendant trust restrictions by the State. It is this bilateral compact that "liquidates" the State's entitlement to public lands in lieu of taxing federal lands, and it is thus the bilateral arrangement with the public land States that satisfies the requirements of constitutional equal footing.

3. *Bilateral Compact*

The Public Land Law Review Commission noted the bilateral nature of the federal school land grant program:

> Commencing with Ohio, the traditional requirement has been that the new public land states must adopt an "irrevocable ordinance" preliminary to admission to the Union in which they recognize the property rights of the United States in the public lands, and that all Federal property shall be immune from state taxation. In addition, the states have agreed not to tax transferees of Federal lands for a stated period and to tax nonresident ownerships the same as those of residents.

In this sense, public land grants to states have not been strictly unilateral bounties, but rather important elements of bilateral compacts. (*One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. 244 (1970)).

The foregoing quotation is bottomed on sound judicial authority.[5] In *Cooper v. Roberts*, 18 How. 173

[5] In **Stearns v. Minnesota**, 179 U.S. 223 (1900), this Court explained why bilateral compacts between a State and the United States are valid so long as they relate to property rights and interests and do not affect sovereign equal footing with the other States:

> When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other States, there was within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857, 11 Stat. 166, authorizing the inhabitants of Minnesota to form a constitution and a state government tendered certain propositions to the people of the Territory, . . . (That the State by a clause in its constitution shall never interfere with the disposal of the soil by the United States, etc.) . . . .
>
> . . . .
>
> That these provisions of the enabling act and the Constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between a State and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of states but only of the power of a State to deal with the nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the nation.
>
> That a State and the nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history. (179 U.S. at 243-245).

(1855), the Court characterized a school land grant to Michigan as a "compact" between Michigan and the United States. And, in *United States v. Aikins*, 84 F.Supp. 260, 266 (1949), *aff'd. sub. nom.* 183 F.2d 192 (9th Circ. 1950), the court reviewed a considerable number of cases, and concluded that railroad grants should be strictly construed, but that school land grants should be liberally construed because such grants:

> . . . are grants from one sovereign, the United States, to another sovereign, the State, for public, and not private purposes of profit, and are not subject to such narrow construction.

4. *Perpetuity and Solemnity of Trust*

This Court underscored the solemnity of the school trust obligation in 1967 when it decided *Lassen v. Arizona*, 385 U.S. 458 (1967). In that case the Land Commissioner of Arizona assumed that he could grant rights-of-way and material sites on school trust lands to the Arizona Highway Department without cash compensation to the school trust fund, if the highway would enhance the value of the adjoining school lands by a measure equaling or exceeding the value of the rights-of-way and material sites granted. The Court held that the nature of the federal trust as created by the school land grants to the State prevented such action, and said that:

> . . . Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands. (385 U.S. at 469).

The Court further explained that:

> The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly made clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms. We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands. (385 U.S. at 460-61).[6]

The importance of this public trust has never been questioned by the courts. See *Alamo Land & Cattle Co., Inc., v. State of Arizona*, 424 U.S. 295 (1976).

5. *Utah Enabling Act: Congressional Conditions for Creation of the Public Trust for Public Schools*

The Utah Enabling Act was passed by Congress as the Act of July 16, 1894, 28 Stat. 107, and was entitled:

> An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States.

[6] In **Lassen v. Arizona, supra,** this Court admonished the United States Attorney General "to maintain whatever proceedings may be necessary" to protect the integrity of the school trust grant to Arizona. Here, the Solicitor General asks this Court to cripple and diminish the school trust grant to Utah.

With respect to the immunity of federal lands from taxation by the State, Section 3 of the Enabling Act authorized a convention to be convened for the purpose of forming a constitution and state government, requiring that:

> . . . said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State . . . that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use . . . .

Section 3 of the Enabling Act then proceeded to require the State of Utah, prior to statehood, to adopt an "ordinance irrevocable" for:

> . . . the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Section 6 of the Enabling Act then provided:

> That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress

> *other lands equivalent thereto . . . are hereby granted to said State for the support of common schools*, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of Interior . . . . (Emphasis added).

Section 10 of the Enabling Act then imposed the specific conditions on the use and disposition of the school land grant contained in Section 6:

> . . . the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . . .

6. *Utah Constitution: Acceptance of the Public Trust*

Utah accepted the conditions and obligations of the federal grant to create a trust in aid and support of the public schools by providing in Section 3, Article X, of the Utah Constitution that such school lands and all proceeds derived therefrom:

> . . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only shall be expended for the support of the common schools.

Section 7, Article X, of the Utah Constitution further provided that:

> All public school funds shall be guaranteed by the State against loss or diversion.

Thus, the public trust for the support of Utah's public school system was created by the grant and attendant conditions established by Congress in the Utah Enabling Act and the acceptance by Utah through the adoption of its Constitution.

7. *Summary*

The lower court repeatedly emphasized the special and substantial features of the school land grant trust. For example:

> The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. (586 F.2d at 766).

Further, the lower court deemed it important to emphasize and quote in full the trial court's Conclusion of Law No. 3:

> *Conclusion No. 3*: Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and

adopted by the people of the State of Utah. (586 F.2d at 764).

With the foregoing background, it becomes easier to appreciate the unique significance of school trust land grants, and the importance that this Court has placed on school indemnity selections.

II. SCHOOL INDEMNITY SELECTIONS MUST BE ON THE BASIS OF EQUAL ACREAGE RATHER THAN EQUAL VALUE

A. *Preface*

It is abundantly clear that the Secretary of the Interior desires to reject Utah's school indemnity selections by implementing a "comparative value" test, and endeavors to justify such action under "classification" authority allegedly derived from Section 7 of the Taylor Grazing Act, and necessitated by an alleged withdrawal of lands under Executive Order No. 6910. This controversy came into focus when Tracts U-a and U-b in Utah were leased for oil shale development in 1974 as part of a federal prototype oil shale leasing program, resulting in a combined "lease bonus" bid of approximately $120 million, with 20% of the bonus to be paid in cash each year for the first three years and the last two "payments" to be credited against development costs incurred by the lessees.[7]

[7] It seems only fair to point out that Utah has been more than cooperative in meeting with representatives of the Department of Interior to identify lands for school indemnity selection that would permit effective land management by both the State and the Department of the Interior. In fact, the Department recommended the areas selected by the State. It also seems appropriate to point out why Utah waited nearly ten years after filing its first selections

Prior to publishing notice for competitive bidding on the prototype tracts, the Secretary of Interior—aware that the proposed prototype tracts had previously been selected by Utah as school indemnity lands, and also aware that Utah claimed equitable title to such lands—requested the Governor of Utah to enter into an agreement with the United States whereby Utah would consent to the issuance of leases by the Secretary, and, if Utah prevailed in its claim to equitable title, Utah would accept the leases as lessor and would honor the terms of the leases. Such an agreement was executed. (R., Vol. III, pp. 73-74).

[7] **Continued**
before bringing this lawsuit. These two matters were clearly explained in the affidavit of Charles R. Hansen, Director of the Utah Division of State Lands, filed in support of Utah's motion for summary judgment—and not controverted in any way by the Secretary of Interior. This affidavit was part of the record before the Tenth Circuit Court, and its pertinent parts are as follows:

> CHARLES R. HANSEN, first being duly sworn upon oath, deposes and says that he is the Director of the Division of State Lands of the State of Utah, and that:
>
> 1. During numerous meetings between 1966 and 1974 between representatives of the Utah Division of State Lands and representatives of the office of the State Director of the Bureau of and Management, held to discuss the adequacy and status of Utah's oil shale selections as indemnity for lost school lands (which are the subject of the present litigation), Utah was advised that there was no objection or question on the part of the Federal Government with respect to whether such selections were in compliance with all statutory and regulatory requirements pertaining thereto, with the exception of the advisability of the State of Utah making selections which would constitute "manageable blocks" of land, and in this regard Utah did thereafter file such selections in such a manner as to satisfy all suggestions offered by the Bureau of and Management. The final suggestions by the Bureau in this regard were explained in a meeting held December 19, 1968, attended by myself and members of my staff as representatives of the State of Utah and by Mr. Robert D. Nielsen, as the State Director of the Bureau of Land Management, and members of his staff as representatives of the Bureau of Land Management. The suggestions

In view of the fact that Utah's Enabling Act and the school indemnification grant contained in 43 U.S.C. §851 require school indemnity selections to be made on the basis of equal acreage, it is interesting to examine the evolution of the Secretary's argument for a comparative value criterion. The Secretary claims that the "comparable value" test derived from a policy established by his predecessor Secretary Stewart L. Udall on January 18, 1967,[8] and that the policy has "won congressional approval." (Secretary's Brief, p. 61). Nothing could be farther from the truth, as will be seen below.

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[7] Continued

offered by the Bureau were formally approved by the Utah Board of State Lands on January 15, 1969, and in compliance therewith Utah subsequently prepared and filed the selection lists dated December 19, 1969, (25,583.20 acres), February 17, 1970 (38,058.81 acres), November 8, 1971 (11,044.87 acres), November 15, 1971 (11,977.49 acres), and November 19, 1971 (12,216.59 acres), and this brought the total pending state selections on oil shale lands to 157,255.90 acres.

2. On numerous occasions I have discussed the status of these pending applications with appropriate representatives of the Federal Government, including discussions with Harrison Loesch, former Assistant Secretary of Interior, and with Reid Stone, Federal Oil Shale Coordinator, and on each occasion I was advised that federal action on the State selections was awaiting development of the Federal proto-type program for oil shale leasing, and that as soon as that program was developed to the point that the Federal Government was ready to issue the original leases, they believed that the selection lists as filed by Utah would be approved and clear lists issued. It was not until February 14, 1974, that Secretary Rogers Morton formally advised Governor Calvin Rampton that the Department of Interior intended to apply a comparative value test to determine whether the oil shale lands selected had substantially more value than the base lands for which selection was made.

[8] At page 15 of his Brief, the Secretary says that he "has adhered steadily to the 'grossly disparate value' policy since at least 1965, . . ." This is difficult to fathom, since the Udall Memorandum—the father of that so-called policy—did not come into existence until two years later.

B. *The "Udall Memorandum" on Comparative Value*

The origin of the comparative value test is somewhat curious. On December 15, 1966, the Director of the Bureau of Land Management sent an intradepartmental memorandum to the Secretary of Interior through the Assistant Secretary for Public Land Management. This memorandum raised questions as to the comparative values of base lands and selected lands, and proposed certain value criteria to be met before indemnity selections received approval, and concluded by stating:

> Your approval of this memorandum will constitute your approval of the suggested guidelines.

At the end of the memorandum a space was provided for the signature of the Secretary, and it apparently was signed on January 18, 1967, by Stewart L. Udall, then the Secretary of the Interior (R., Vol. III, pp. 49-51). While the guidelines contained within the memorandum have never been implemented in connection with any school indemnity selections, even though the memorandum is more than twelve years old, it has become the sole source of the Secretary's "policy" for employing such a comparative value test.

It seems that the Udall Memorandum was buried somewhere in Department of Interior files for more than seven years. It was the best kept secret in Washington. Apparently it was never published in the Federal Register, was not the subject of any rule-making procedures, and was not implemented by any regulations published in the Code of Federal Regulations. It apparently has

never to this day been utilized in any so-called "classification" of school indemnity selections. It is particularly interesting that, as recently as 1976, the Interior Department's own Board of Land Appeals was not aware of, and could not find, the Udall Memorandum. See *State of New Mexico*, IBLA 75-582, 24 IBLA 135, 137 (March 8, 1976).

And, equally interesting, is the fact that more than five years after the Udall Memorandum allegedly became official Department "policy," Secretary of Interior Rogers Morton was not aware of its existence. On May 23, 1972, Secretary Morton wrote to Utah's Governor Calvin L. Rampton concerning the very school indemnity selections now in dispute, and assured Utah that to the extent the matter was within his discretion he would approve Utah's selections, and would disapprove them only if there was some legal "barrier" which prohibited approval:

> The opinion of the Attorney General has been requested concerning the filings for selection of mineral lands by the State of Utah. The Attorney General has been asked whether there is any legal barrier to the approval of the filed selections of the State of Utah and what point in time the rights of the State vest, i.e., at the time of filing for selection or at the time of approval of such selections.
>
> . . .
>
> . . . *If the Attorney General finds that there is no legal barrier to the approval of the State selection, then this Department will initiate the administrative steps necessary to accomplish that approval.*

> *With this information and assurances at your disposal*, will you withdraw any objection to the proposed leasing of two tracts of land in Utah for oil shale development? (Emphasis added; R., Vol. III, p. 68).[9]

If Secretary Morton had been aware of any "comparative value" policy that would have given him discretion to reject the selections, he surely would have mentioned it when he gave Utah his "assurances" that he would initiate the necessary administrative steps to accomplish approval of the indemnity selections.

In any event, Utah was never advised as to when, if ever, the Secretary received the requested opinion from the United States Attorney General. If such an opinion was prepared, it has never been made public.

It was not until February 14, 1974—more than seven years after the Udall Memorandum was signed—that the "comparative value" policy first saw the light of day. On that date, Secretary Morton wrote a further letter to Governor Rampton concerning Utah's school indemnity selections. Utah was startled to learn of the "comparative value" policy, as explained by Secretary Morton:

> As you know, the Department of the Interior has not as yet acted upon the State's applications. The principal question presented by the applica-

[9] If the Secretary really believed that he was authorized or required to "classify" school indemnity selections under Section 7 of the Taylor Grazing Act, he certainly would have mentioned that fact to Governor Rampton in his May 23, 1972 letter; and he certainly would not have asked the United States Attorney General if "the rights of the State vests" at the date of selection.

> tions is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. §315f (1974), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia,* Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.
>
> In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate to advise you that we will apply the above-mentioned policy in that adjudication. (R., Vol. III, p. 70).

It is perhaps revealing that the Secretary now characterizes the February 14, 1974 letter as an "announcement" of the Udall Memorandum. (Secretary's Petition, p. 5). Utah initiated this litigation less than three weeks after receipt of Secretary Morton's Febuary 14th letter.

It seems significant that the Secretary has never explained how comparative values would be determined. Any appraisal of values under the Taylor Grazing Act would be conducted by the Bureau of Land Management, and could consider surface estate values only, since mineral deposits are within the jurisdiction of the

United States Geological Survey under 43 U.S.C. §31(a). Moreover, mineral deposits cannot be evaluated by a "walk-on" inspection, but would require extensive drilling and blocking, at a cost of untold millions of dollars. There is no evidence that the Secretary has ever requested Congress to fund such a program. Indeed, the lower court was most skeptical as to whether the Secretary even had an established "policy" that could be implemented in any effective way:

> At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are nonexistent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. (586 F.2d 760).

Aside from the very dubious nature and status of the Udall Memorandum as an administrative tool, it is important to emphasize that the "policy" embraced in that Memorandum is clearly contrary to law and has been expressly rejected by Congress.

First, 43 US.C. §851 expressly grants and appropriates "other lands of equal acreage" as indemnification for lost school lands. The Udall Memorandum would reverse this congressional grant, and by an illegal administrative fiat amend the statute to read "other lands of equal value" are appropriated to satisfy school indemnity rights.

Furthermore, Congress has provided its own measure of fair value in indemnity selections by authorizing States to select mineral lands *only* when the lost school lands are also mineral in character. If Congress had intended to authorize the Secretary to employ an additional value criterion, it would have expressly done so, as it did in Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), wherein the Secretary is authorized to utilize either equal acreage or equal value as the basis for approving *exchanges* of state land for federal land.

As indicated earlier, the Secretary has never applied a comparative value criterion in acting on any prior school indemnity selections. The Secretary claims as his source of authority for the Udall Memorandum the 1936 Amendment to the Taylor Grazing Act, and so he claims to believe that he has had this authority for more than forty years—and yet he has never used it. Prior school indemnity selections, as filed by Utah and other States, have never been subjected to such a comparative value test. But now, for the first time, the Secretary desires to initiate this practice to deny Utah's school indemnity selections.

And it is of substantial significance that the Secretary has repeatedly asked Congress for authority to employ a comparative value test when determining whether school indemnity selections are in accordance with congressional requirements. Congress has steadfastly refused to grant the Secretary such authority. Early in 1963, Congressman Wayne Aspinall (D.Colo.) introduced H.R. 16, which would have provided that school

indemnity selection of mineral-rich land would be authorized only when the lost lands were of equal value. If the bill had passed there would have been a question as to whether it was unconstitutional as a unilateral amendment of a bilateral compact between sovereigns, but the bill was tabled. And that was that!

Then, in 1966, when H. R. 5984 was introduced to amend 43 U.S.C. §852 by allowing States to select unsurveyed lands as indemnification for lost school lands, the Department of Interior sought to have the bill amended to require equal value rather than equal acreage for school indemnity selections. In rejecting any such amendment, the Senate Committee on Interior & Insular Affairs noted:

> The Department of the Interior, in its report which is included below, indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leasable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of H.R. 5984, rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that public land issue. (Senate Report No. 1213, 89th Cong., Second Sess., 1966, at p.2).

So, without the Department's requested "equal value" amendment, H.R. 5984 was duly enacted into

law as the Act of June 26, 1966, PL 89-470, 80 Stat. 220, amending 43 U.S.C. §852.

The Department of Interior's change of position in registering "no objection" to enactment of PL 89-470 without the Department's previously requested amendment to provide "an equal value concept" drew the attention of the lower court:

> Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (United States v. Union Pacific Raliroad Company, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. (State of Wyoming v. United States, 255 U.S. 489 (1921)). We deem this to be particularly significant in recognition that the sole specific Congressional reference in §852(a) (1), supra, relates to lands ". . . mineral in character may be selected by a State [if] . . . the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; . . . ." No reference whatsoever is made to the *value* of the "minerals in character." *This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing "acre for acre" selection basis.* U.S. Code, Cong. & Ad. News, 2nd Session, Volume II, p. 2324 (1966). (586 F.2d 761; Emphasis added).[10]

Congress was directly confronted with the "equal acreage" rather than "comparative value" basis for school indemnity selections on other occasions. In 1958 the House Committee on Interior and Insular Affairs carefully considered the matter in connection with S. 2517, which became an amendment to 43 U.S.C. §852. The Committee concluded that the federal interest was adequately protected by the equal acreage criterion:

> *The Federal interest is amply protected by S. 2517. Mineral lands may be selected as indemnity lands only for other mineral lands.* Lands on a known geologic structure of an oil and gas field may be selected as indemnity only for lands similarly situated. And lands subject to mineral lease or permit may be selected only if all lands subject to the lease or permit are chosen and only if none of the lands is in a producing or producible status. The character of the lands for which indemnity is sought will be determined as of the date of application for selection. (1958 U.S. Code Cong. and Adm. News, p. 3964; Emphasis added).

And, at that time, the Department of Interior submitted a report to Congress that clearly recognized the right of the States to select school indemnity lands of equal acreage, as distinguished from various exchanges under other laws where equal value was the measure of the exchange:

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[10] It was in December 1966—the very year that Congress rejected (and the Department withdrew its request for) an equal value criterion—that officials in the Department of Interior apparently drafted the "Udall Memorandum," approved by Secretary Udall the following January.

> Under other statutes a State . . . may exchange . . . lands of equal value, but, naturally, a State would prefer to use lands of little value as base for indemnity selections rather than for exchanges. The reason for this is that in making indemnity selections lands are taken on a equal acreage basis, but under the Taylor Grazing Act, as amended, (43 U.S.C., sec. 315 et seq.), and the Forest Exchange Act, as amended, (16 U.S.C., secs. 485-486), exchanges are on a basis of equal value.
>
> The direction in which self-interest would lead a State in such a situation is obvious. Any objection to permitting a State to select lands on a basis of equal acreage would be greatly increased if it were to be permitted to select mineral lands in lieu of non-mineral lands which had been lost. In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965).[11]

Of course, the 1958 Amendment to 43 U.S.C. §852 did not, and had never purported to, authorize the States to select mineral lands as indemnity for lost non-mineral lands. The requirements for mineral selection were as explained by the House Committee on Interior and Insular Affairs, quoted above.

In view of the clear and repeated insistence by

[11] The Department thus makes it absolutely clear in this 1958 report not only that school indemnity selections must be on the basis of equal acreage rather than equal value, but, perhaps more important, that such selections have nothing at all to do with the Taylor Grazing Act.

Congress that school indemnity selections be on the basis of equal acreage, it is difficult to see how the Secretary can now represent to this Court that the policy of the Udall memorandum, though never implemented, is a "practice" that has "won congressional approval." (Secretary's Brief, p. 61). The whole basis for such a representation is an alleged letter—not in the record—written in January of 1974 by two Senators to the Secretary of the Interior, apparently referring to the Udall Memorandum, and declaring that "we agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a 'gross disparity' of value between the lost lands and the selected lands." This letter apparently was written one month before that "policy" was "announced" to Utah in Secretary Morton's letter to Governor Rampton on February 14, 1974. Apparently the two Senators were not too familiar with the Udall policy, since they thought it was promulgated in 1965, rather than in 1967.

More to the point, however, is the fact that the Secretary relies on the 1936 Amendment to the Taylor Grazing Act as his sole source of authority for promulgation of the Udall Memorandum, and the further fact that the Secretary relies solely on a letter written by two Senators thirty-eight years after that statute was enacted, to show that the Udall Memorandum is a "practice" that has "won congressional approval." That argument is nothing short of absurd.

The Secretary's present position in support of an equal value criterion is entirely inconsistent with every-

thing that has gone on previously, both before and after the 1936 Amendment to the Taylor Grazing Act. The cases and departmental decisions were entirely clear and consistent in recognizing equal acreage, rather than equal value, as the measure for indemnity selections. See *Mullan v. United States*, 118 U.S. 271 (1886); *California v. Deseret Water Company*, 243 U.S. 415 (1917); *United States v. Morrison*, 240 U.S. 192 (1916); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Wyoming v. United States*, 255 U.S. 489 (1921); and 52 I.D. 273 (February 1, 1928). The same result has obtained since the 1936 Amendment: see *State of California*, 67 I.D. 85 (February 29, 1960); and 43 C.F.R. 2621.0-3.

Of particular significance is the fact that on September 14, 1962, Thomas J. Cavanaugh, Associate Solicitor for Public Lands, advised the Director of the Bureau of Land Management with respect to the legality of considering disparity of values in school indemnity selections. Associate Solicitor Cavanaugh, it will be noted, commented on both the 1958 Amendment to 43 U.S.C. §852 and the Department's report thereon. And his opinion was firm and conclusive:

> In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered . . . .
>
> When the state lieu selection statutes were last amended in 1958, it was clear that Congress recognized the practice by the states of offering as

> base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law . . . Accordingly, it is clear that the 1958 amendments to the state indemnity selection laws not only reaffirmed the position of this Department that discrepancies in values between offered and selected lands was not to be considered, but also intended the equal acreage rather than equal value test be carried forward in the case of mineral lands. Therefore, the mere fact that the mineral value of the selected lands far exceeds that of the offered lands may not operate as a bar to the selection. (R., Vol. III, pp. 42-43).

What more need be said?

III. THE STATES HAVE THE RIGHT TO DECIDE WHICH UNAPPROPRIATED PUBLIC LANDS SHALL BE SELECTED

A. *Preface*

It will be recalled that, by virtue of Section 6 of the Utah Enabling Act, Congress not only granted to Utah four sections within each township for the support of the common schools, but further granted other lands "equivalent thereto" in lieu of any school lands originally granted to, but not received by, Utah. In addition to this specific indemnity grant to Utah, 43 U.S.C. §851 contains a basic indemnity grant and appropriation to all public land States entitled to school indemnity selections. So far as pertinent here, the relevant language provides that when original school grants

in place do not pass to the States because of federal pre-emption or private entry prior to survey, then:

> . . . other lands of *equal acreage* are hereby *appropriated and granted,* and may be selected in accordance with the provisions of section 852 of this title, by said State, ... (43 U.S.C. §851; Emphasis added).

Section 43 U.S.C. 852(a) provides that:

> The lands appropriated by section 851 of this title shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State . . . .

The Secretary's strained and irrational construction of Section 7 of the Taylor Grazing Act would seize upon one single word—"proper"—and seek to use that word as the springboard by which he could use his discretion, and deprive the States of their discretion, in determining which indemnity lands could be selected. Indeed, as noted above, Section 851 declares that indemnity lands "may be selected, in accordance with the provisions of Section 852 of this title, *by said State*, in lieu of such as may be thus taken by pre-emption or homestead settlers" (Emphasis added).

And in 1966, when Congress amended Section 852 to allow States to select unsurveyed lands, and also to select lands as indemnity for lands lost after survey but before creation of the State, the Senate Interior & Insular Affairs Committee underscored and reaffirmed the importance of discretion on the part of the State in making indemnity selections:

> . . . there is no reason why a State should not be indemnified and receive the full grant of lands lost through no fault of its own regardless of when the loss took place. Nor is there reason to restrict selection of land from among those lands that have been surveyed. The survey of public lands is continuing; but many areas remain unsurveyed.
>
> *The present choice to be exercised by a State in seeking indemnity lands is limited because of the large acreage which remains unsurveyed.* This tends to militate against principles of good land management, particularly in terms of consolidating viable blocks suitable for development. (*Senate Report No.* 1213, *89th Cong., Second Sess.*, 1966; Emphasis added).

Thus, as the Senate Committee made clear, in 1966 the basic limitation on the state's school indemnity selection discretion was the fact that much of the public domain was unsurveyed—and that restriction was removed. The right of States to make the selections was also clearly recognized in 1958 by the House Committee on Interior and Insular Affairs and the Department of the Interior. See 1958 *U.S. Code Cong.* & *Adm. News,* pp. 3964-3965.

B. *Supreme Court Confirmation*

This Court reviewed the comparative scope of discretion to be exercised by the States and the Secretary of the Interior in connection with indemnity selections when it decided *Payne v. New Mexico*, 255 U.S. 367 (1921), and *Wyoming v. United States*, 255 U.S. 489 (1921). The lower court examined these decisions in some detail, as is shown from the following extracts from its opinion:

Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.

Payne v. New Mexico, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from canceling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here). The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:

> If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.

255 U.S., at p. 370.

Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne, supra*, noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:

> The words relied upon (subject to the approval of the Secretary of the Interior) are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

255 U.S., at p. 371

State of Wyoming v. United States, *supra*, involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu

selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to "*waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state. See*: California v. Deseret Water, Etc., Co., 243 U.S. 415 (1917); Payne v. New Mexico, *ante*, 367. Other laws of general application, §§441, 453, 2478, Rev. Stats. require that the selections be made under the direction of the Secretary of the Interior." (Emphasis supplied) 255 U.S., at 494.

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn National Forest. The selected in lieu acreage "was vacant, unappropriated, and neither known nor believed to be mineral . . . . 'The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . .'" 255 U.S., at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary executive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited surface right-certification or to show that the 80 acres was *still* not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title when the selection was made. Accordingly, Wyoming refused the tender. The commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

> The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, *and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove and reject it on the ground that the selected land was withdrawn two years later under the Act of June* 25, 1910, *or* still later *was discovered to be mineral land,* that is, to be *valuable for oil.* (Emphasis supplied.)

255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful "in lieu" selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state*, but rather:

> . . . *of determining whether an existing privilege conferred by Congress had been law-*

> *fully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in* 1912. If these were valid then — if they met all the requirements of the *congressional proposal*, including the directions given by the Secetary — they remained valid *notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.* (Emphasis supplied.)

255 U.S., at pp. 496, 497.

The Court equated the "in lieu" selection to a cash entry, citing to Benson Mining Co. v. Alta Mining Co., 145 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in Daniels v. Wagner, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary's position. The Court held that when selections were made in accord with statutes it was the plain duty of the Secretary to

approve them and *that the Secretary's power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in State of Wyoming v. United States, *supra*, directly applicable to the contention raised by the Secretary here that the "value for value" criteria is to be employed in approving the "in lieu" selection at issue is:

> . . . If these (selections of "in lieu" lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.

255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative *value* of tracts which are "mineral in character." The Supreme Court obliquely recognized this, *supra*, by reference to "whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected."

Thus, we conclude that the solemn bilateral agreement between the United States and the

"Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted — or those selected "in lieu" — while the United States Government is not bound to the performance of those covenants it agreed to in consideration for Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in State of Wyoming v. United States, *supra.* (586 F.2d at 769-772; Emphasis in opinion).

C. *Summary*

It is thus clear that the States have the right to determine which part of the unappropriated public domain shall be selected to satisfy school indemnity rights, and the Secretarys "discretion" is limited to a ministerial adjudication to determine whether the selections are in compliance with the statutory criteria of 43 U.S.C. §852. The Secretary argues, however, that the Taylor Grazing Act has rendered the *Payne* and *Wyoming*

cases inapplicable to school indemnity selections because under that Act he now claims to have authority to "classify" school indemnity selections. As shall now be seen, however, that argument of the Secretary is really moot because "classification" under the Taylor Grazing Act would invoke the very same statutory criteria as an administrative adjudication under the school indemnity selection statutes.

IV. THE STATUTORY CRITERIA OF 43 U.S.C. §852 WOULD CONTROL ANY CLASSIFICATION OF SCHOOL INDEMNITY SELECTIONS UNDER SECTION 7 OF THE TAYLOR GRAZING ACT

A. *Preface*

Section V of this Brief will show that there is absolutely no basis or justification for bringing school indemnity selections within the "classification" requirements of Section 7 of the Taylor Grazing Act. Nevertheless, the present section of this Brief will examine the hypothesis that, under some strained construction of the Taylor Grazing Act, school indemnity selections could be subjected to the classification procedures of Section 7. In so doing, however, Utah emphasizes that it places primary reliance on the fact that the Taylor Grazing Act has no applicability whatsoever to school indemnity selections.

With that introduction, it will now be shown that, even if school indemnity selections are to be classified under Section 7 of that Act, the criteria for classification must be those set forth in 43 U.S.C. §852 (the in-

demnity selection criteria), because Section 7 incorporates by reference the "applicable" public land law, and Section 852 is the applicable law for determining whether school indemnity selections are in accordance with the congressional requirements. And Section 852 requires that selections be on the basis of equal acreage rather than equal value.

The net result, of course, is that exactly the same result will obtain whether or not the Secretary classifies land for disposition in satisfaction of school indemnity rights under Section 7, because if the ministerial adjudication under Section 852 reveals that school indemnity selections are in accordance with the statutory criteria, then it automatically follows that the lands are "proper" for classification and disposition under Section 7. The specific language of the relevant statutes will now be examined.

B. *Nature of Classification Criteria under Section 7*

If the "classification" language of Section 7 of the Taylor Grazing Act could be construed in a broad enough fashion to encompass school indemnity selections, then it must be remembered that the classification procedures apply to a wide variety of uses and dispositions of federal land. Most of such uses and dispositions will be governed by separate public-land laws that authorize such uses and dispositions, and to the extent that Section 7 contains criteria for classification, those criteria will be supplementary to the criteria contained within the applicable public-land statute which authorizes the particular use or disposition of the federal land.

As will be shown in Section V of this Brief, *infra*, which discusses the legislative history of the Taylor Grazing Act, the basic purpose of classification under Section 7 was to determine whether homestead entries should be allowed on federal lands in grazing districts. Thus, the original enactment of Section 7 in 1934 provided that the Secretary of Interior was authorized:

> . . . to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after the same have been classified and opened to entry . . . . (48 Stat. 1272)

The classification authority and duty of the Secretary were entirely clear under this Section. Classification applied only to homestead entries, and the statutory criteria were that (1) the lands to be opened to homestead entry had to be more valuable for the production of agricultural crops than for grazing of native grasses and forage plants, (2) homestead entries could not encompass more than 320 acres, and (3) homestead entries could not be made until the Secretary had classified the land as suitable for such purpose under criterion number (1) above. Thus, the language of Section 7 in the 1934 Act was clear and concise.

The 1936 Amendment, as discussed at some length in Section V.C of this Brief, *infra*, retained substantially the same language with respect to homestead classifica-

tion, but also authorized the Secretary to classify lands within a grazing district when such lands are:

> . . . more valuable or suitable for any other use than for the use provided for under this Act [grazing use], or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws . . . . (49 Stat. 1976).

Thus, if the foregoing language relating to "lieu . . . rights" and "selection" could be construed to include school indemnity selections, the single and sole criterion is whether the lands selected are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant . . . ." If so, the selected land is to be opened for "selection . . . for disposal in accordance with such classification under applicable public-land laws. . . ." It is thus of the utmost importance to observe that the *only criterion* for classification in favor of disposition for school indemnity selection would be a determination as to whether the selected land is *proper for acquisition in satisfaction of outstanding lieu rights.*

The only conceivable way in which the Secretary can determine whether selected lands are "proper" for disposition in satisfaction of lieu rights is by determining whether the State has made a proper selection in accordance with "applicable" statutory criteria and restrictions, and those criteria and restrictions are set forth

in detail in 43 U.S.C. §852.[12]

Before examining the criteria and restrictions of Section 852, however, it is very important to observe that if Congress had intended to confer on the Secretary any additional discretion, or to impose any other or additional conditions or limitations on school indemnity selections, beyond those set forth in Section 852, it certainly would have done so when the 1936 Amendment to the Taylor Grazing Act was passed. This is easily illustrated by the fact that Congress did set forth a number of criteria for other kinds of land dispositions in the 1936 Amendment, and a few of those criteria deserve brief mention.

For example, the restrictions and criteria for classification in favor of homestead entries, as set forth in the 1934 Act and as quoted above, were continued in effect by the 1936 Amendment. Further, Section 8(b) of the 1936 Amendment authorized the exchange of private land for federal land:

> When public interests will be benefited thereby the Secretary is authorized to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district, and in exchange therefor to issue patent for not to exceed an equal value of sur-

[12] If the Secretary's view were correct, he would not only be authorized to approve or reject school indemnity selections for any impulse, whim or caprice, but such action would be immune from judicial scrutiny. This is so because the Secretary, in his view, would be guided only by the statutory criterion that the lands be "proper" for school indemnity selection. Thus, there would be no "law to apply" and no jurisdiction for judicial review of agency action. **Citizens to Preserve Overton Park, Inc. v. Volpe,** 401 U.S. 402 (1971).

> veyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands. (49 Stat. 1977).

Here again, the criteria are explicit and clear: (1) the Secretary has broad discretion in acting on any private application for exchange, and must first determine that the "public interests" will be benefited by the exchange; (2) the private land must have a value equal to or greater than the federal land to be exchanged; and (3) the federal land must be within the same State as the private land, or must be located in the nearest adjacent State and not more than fifty miles from the private base land.

No one can deny that school indemnity selection rights are far more important and sacred than offers by private persons to trade lands with the Federal Government, and no one can deny that if Congress had intended to confer on the Secretary discretion to consider "public interest" factors or impose additional criteria on school indemnity selections, it expressly would have done so, just as it did for private exchanges. It makes no sense to suppose that Congress would spell out conditions and criteria for the exchange of private land for federal land, but would at the same time grant to the Secretary unlimited discretion, with no criteria or guidance, to deny school indemnity selections by classifying the land for retention in federal ownership.

It might also be noted that Section 8(c) of the 1936 Amendment authorizes exchanges of state land

for federal land (not to be confused with school indemnity selection rights):[13]

> Upon application of any State to exchange lands within or without the boundaries of a grazing district the Secretary of the Interior shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State. The Secretary of the Interior shall accept on behalf of the United States title to any State-owned lands within or without the boundaries of a grazing district, and in exchange therefor issue patent to surveyed grazing district land not otherwise reserved or appropriated or unappropriated and unreserved surveyed public land; and in making such exchange the Secretary is authorized to patent to such State, land either of equal value or of equal acreage: Provided, that no State shall select public lands in a grazing district in furtherance of any exchange unless the lands offered by the State in such exchange lie within such grazing district and the selected lands lie in a reasonably compact body which is so located as not to interfere with the administration or value of the remaining land in such district for grazing purposes as set forth in this Act.
>
> When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secre-

[13] Under the 1934 Act private and state exchanges were controlled by common criteria, at least under an opinion of the Solicitor of the Interior. This was changed in the 1936 Amendment for the purpose, **inter alia**, of making state exchanges mandatory. For an explanation of the underlying conflict precipitating that part of the Amendment, see Section V.B of this Brief, **infra**.

> tary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State.
>
> For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The selection by the State of lands in lieu of any such protracted school sections shall be a waiver of all of its right to such sections.

Section 8(d) of the 1936 Amendment then adds further procedures and conditions for exchanges:

> Before any such exchange under this section shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands, and if located within the exterior boundaries of a grazing district they shall become a part of the district within the boundaries of which they are located: *Provided*, That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. Where mineral reservations are made by the grantor in lands

> conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. No fee shall be charged for any exchange of land made under this Act except one-half of the cost of publishing notice of a proposed exchange as herein provided.

It will be noted that there are literally dozens of conditions, limitations, criteria and other provisions to spell out the exact authority and duties of the Secretary when acting on exchanges of land, including lieu selections for school lands in place (as distinguished from school *indemnity* selections for lost school lands).

Again, the pertinent observation is that the 1936 Amendment to the Taylor Grazing Act gave very detailed, express and explicit instructions with respect to classification of land for specific use and disposition, including homestead entries and exchanges of private land; and also with respect to exchanges of state land (which do not require classification). But, if the Taylor Grazing Act were to be construed so as to require classification of school indemnity selections, there are no such criteria, instructions or procedures—merely the general and vague language that the selection must be "proper" in satisfaction of the selection right under the "applicable" public-land law.

Thus, if Section 7 of the Taylor Grazing Act could be construed so as to authorize the Secretary to classify land for disposition in satisfaction of school indemnity rights, it is clear beyond question that he must consult the applicable public-land law to ascertain the conditions, limitations and restrictions which will reveal whether such school indemnity disposition is "proper". That statute, 43 U.S.C. §852, deserves closer scrutiny.

C. *Nature of Adjudication Criteria under* 43 *U.S.C.* §852

As will be recalled, 43 U.S.C. §851 "appropriated and granted" school indemnity lands of equal acreage to be selected by the States "in accordance with the provisions of section 852 of this title." It is most illuminating to note the detailed and specific instructions and limitations set forth in Section 852:

> §852. Selections to supply deficiencies of school lands.
>
> (a) The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:
>
> (1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;
>
> (2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and
>
> (3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection. (4) If a selection is consummated as to a portion but not all of the lands subject to any mineral lease or permit, then, as to such portion and for so long only as such lease or permit or any lease issued pursuant to such permit shall remain in effect, there shall be automatically reserved to the United States the mineral or minerals for which the lease or permit was issued, together with such further rights as may be necessary for the full and complete enjoyment of all rights, privileges and benefits under or with respect to the lease or permit: *Provided, however,* That after approval of the selection the Secretary of the Interior shall determine what portion of any rents and royalties accruing thereafter which may be paid under the lease or permit is properly applicable to that portion of the land subject to the lease or permit selected by the State, the portion applicable being determined by applying to the sum of the rents and royalties the same ratio as that existing between the acreage selected by the State and the total acreage subject to the lease or permit; of the portion applicable to the selected land 90 per centum shall be paid to the State by the United States annually and 10 per centum shall be deposited in the

Treasury of the United States as miscellaneous receipts.

(5) If a selection is consummated as to all of the lands subject to any mineral lease or permit or if, where the selecting State has previously acquired title to a portion of the lands subject to a mineral lease or permit, a selection is consummated as to all of the remaining lands subject to that lease or permit, then and upon condition that the United States shall retain all rents and royalties theretofore paid and that the lessee or permittee shall have and may enjoy under and with respect to that lease or permit all the rights, privileges, and benefits which he would have had or might have enjoyed had the selection not been made and approved, the State shall succeed to all the rights of the United States under the lease or permit as to the mineral or minerals covered thereby, subject, however, to all obligations of the United States under and with respect to that lease or permit.

(b) Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section,

and not more than one-quarter of a township, one-quarter section of land: *Provided*, That the States which are, or shall be entitled to both the sixteenth and thirty-sixty sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

(c) Notwithstanding the provisions of section 282 of this title on the revocation not later than 10 years after the date of approval of this Act, of any order of withdrawal, in whole or in part, the order or notice taking such action shall provide for a period of not less than six months before the date on which it otherwise becomes effective in which the State in which the lands are situated shall have a preferred right of application for selection under this section, subject to the requirements of existing law, except as against the prior existing valid settlement rights and preference rights conferred by existing law other than section 282 of this title, or as against equitable claims subject to allowance and conformation, and except where a revocation of an order of withdrawal is made in order to assist in a Federal land program.

(d) (1) The term "unappropriated public lands" as used in this section shall include, without otherwise affecting the meaning thereof, lands withdrawn for coal, phosphate, nitrate, potash, oil, gas, asphaltic minerals, oil shale, sodium, and sulphur, but otherwise subject to appropriation, location, selection, entry, or purchase under the nonmineral laws of the United States; lands withdrawn by Executive Order Numbered 5327 of April 15, 1930, if otherwise available for selection: and the retained or reserved interest of the

United States of all minerals or any specified mineral or minerals.

(2) The determination, for the purposes of this section of the mineral character of lands lost to a State shall be made as of the date of application for selection and upon the basis of the best evidence available at that time. As amended June 24, 1966, Pub.L. 89-470, §2, 80 Stat. 220.

§852a. Applications fo unsurveyed lands; regulations; acreage requirements.

The Secretary of the Interior may issue regulations governing applications for unsurveyed lands. If he establishes any minimum acreage requirements, they shall provide for selection of tracts of reasonable size, taking into consideration location, terrain, and adjacent land ownership and uses. Pub.L. 89-470, §3, June 24, 1966, 80 Stat. 220.

§852b. Survey of lands prior to transfer; time for survey; availability of funds; lands suitable for transfer.

Prior to issuance of an instrument of transfer, lands must be surveyed. The Secretary of the Interior shall within five years, subject to the availability of funds, survey the exterior boundaries of lands approved as suitable for transfer to the State. Pub.L. 89-470, §4, June 24, 1966, 80 Stat. 220.

The substance of the foregoing provisions are not in dispute, and there is no point or purpose in discussing the various conditions and restrictions set forth in Section 852 as quoted above. The salient observation

is that this statute contains a comprehensive, integrated statement of congressional criteria which the Secretary of Interior must follow in adjudicating the validity of school indemnity selections. And these are the criteria which the Secretary must also follow in determining if the indemnity selections are "proper" for disposition in accordance with Utah's indemnity selection "rights."

There is no doubt that Section 852 applies to Utah's school indemnity selections, because Congress expressly provided in the Act of May 3, 1902, 32 Stat. 188, codified as 43 U.S.C. §853, that:

> All the provisions of sections 851 and 852 of this title, which provide for the selection of lands for education purposes in lieu of those appropriated for other purposes, and are made applicable to the State of Utah, *and the grant of school lands to said State*, including sections 2 and 32 in each township, *and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said sections*, anything in the Act providing for the admission of said State into the Union, to the contrary notwithstanding. (Emphasis added).

Thus, Congress has specifically declared that Utah's school indemnity selections "shall be administered and adjusted in accordance with the provisions" of Sections 851 and 852 of Title 43, U.S.C. If the Secretary is to be permitted to "classify" land for disposition in satisfaction of those indemnity selection rights, he must consult Sections 851 and 852, and may not substitute his personal notions of public policy and public interest for the clear instructions and requirements mandated by Congress.

D. *Classification not a Condition to Vesting of Equitable Title*

Even if Section 7 of the Taylor Grazing Act could be construed so as to authorize the Secretary to classify land for disposition in satisfaction of school indemnity selection rights, it is clear that the act of classification is not a condition precedent to equitable title vesting in the State on the date that a school indemnity selection list is filed—if it is subsequently determined that such selection list satisfies the requirements of 43 U.S.C. §852.

The language in Section 7 that the Secretary hangs his hat on reads as follows:

> Such lands shall not be subject to disposition, settlement or occupation until after the same have been classified and opened to entry . . . .

School indemnity selection lists are not, and have never been considered to be, "entries" in the traditional sense. The word "entry" obviously refers to homestead entries, which were the principal subject of the section, and other private entries through exchange, selection, or otherwise. Accordingly, any limitation against "disposition" prior to classification is a limitation on such private entries, but not on school indemnity selections.

Moreover, it will be noted that 43 U.S.C. §852 contains many more conditions, limitations and restrictions than the mere "classification" under Section 7, and this Court has made clear that those conditions and

restrictions do not prevent equitable title from vesting in the State at the date that the selection list is filed.

Whether equitable title vests or not is dependent on whether the statutory criteria and conditions of Section 852 have been satisfied; if so, equitable title vested as of the date of filing, and, if not, equitable title did not vest at all and the selection lists must be rejected. But the mere fact that some period of time must elapse after the date of filing and before it is known whether equitable title vested at the date of filing in no way operates to delay the vesting of equitable title until the time when the Secretary finally gets around to making his ministerial adjudication or, for that matter, his "classification" under Section 7 of the Taylor Crazing Act.

This is clearly explained in *Cameron v. United States*, 252 U.S. 450 (1920):

> . . . It is of course not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, *to determine the question whether or not such title has passed.* (252 U.S. at 461; Emphasis added).

As to the time when equitable title passes, the Supreme Court was sufficiently explicit in *Wyoming v. United States*, 255 U.S. 489 (1921), where, speaking with reference to a school indemnity selection, it was held that:

> In principle, it is plain that the validity of the selection should be determined as of the time when it was made, that is, according to the conditions then existing . . . .
>
> If these were valid then [the waiver and selection by the State]—if they met all the requirements of the congressional proposal, including the directions given by the Secretary—they remained valid notwithstanding the subsequent change in conditions [discovery of oil in the selected land at a time when mineral lands were not subject to selection]. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. *Equity then regards the State as the owner of the selected tract and the United States as owing the other;* and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected. (255 U.S. 496-97; Emphasis added).

The Court then went on to explain that the basis for equitable title was a form of equitable conversion, because the State had paid the full purchase price for the selected land and had done everything required of it to obtain title—and the only remaining act necessary for the State to obtain *legal title* was an act to be performed by the United States, *i.e.*, the ministerial adjudication by the Secretary of Interior.

When a State files a school indemnity selection, it must identify the lost school lands for which the selection is made, and the selection thus operates as a present, effective relinquishment and waiver by the State of any claim to such lost lands. It is this relinquishment

and waiver that constitutes a full payment by the State for the selected lands at the time that the indemnity selection lists are filed.

The Court said that:

> . . . the State's right under the selection was precisely the same as if in 1912 it had made a cash entry of the selected land under an applicable statute, for the waiver of its right to the tract in the forest reserve was the equivalent of a cash consideration. And yet it hardly would be suggested that the Commissioner or the Secretary on coming to consider the cash entry could do otherwise than approve it, if at the time it was made the land was open to such an entry and the amount paid was the lawful price. (255 U.S. at 497).

The Court then continued at some length to demonstrate that its prior opinions had been consistent with the proposition that equitable title passes when the purchase price is paid in full (see 255 U.S. 497 *et seq.*).

As an aside, it will be noted that the Court's analogy to a "cash entry" was not a characterization of school indemnity selections as "entries" but was a declaration that such selections are the legal equivalent of entries where the purchase price is fully paid at the time of entry.

All other decisions of the Supreme Court are fully consistent with the *Wyoming* case in holding that equitable title passes when a State files a school indemnity selection in accordance with the requirements of the applicable statutory criteria. See, *e.g.*, *Benson Mining*

Company v. Alta Mining Company, 145 U.S. 428 (1892); *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589 (1897); *Cameron v. United States*, 252 U.S. 450 (1920); and *Payne v. New Mexico*, 255 U.S. 367 (1921).

E. *Summary*

The foregoing section of this Brief has explored the nature and consequences of any classification which the Secretary might conduct under Section 7 of the Taylor Grazing Act to determine whether school indemnity selections are "proper" for disposition in satisfaction of such selection rights. In so doing, it has been demonstrated that such classification must be conducted in exact accordance with the satutory criteria and restrictions set forth in 43 U.S.C. §852, and that the process of classification is not a condition precedent to equitable title vesting in the State at the time the selection lists are filed.

Both the trial court and the court below so held. The trial court specifically declared that, even if it were to be assumed, *arguendo*, that the Secretary had authority to classify school indemnity selections under Section 7 of the Taylor Grazing Act, he could not apply a "comparative value" criterion because the only available law to apply to such a classification was contained in 43 U.S.C. §852, which requires such selections to be based on equal acreage. The lower court approved that holding but did not find it necessary to discuss in detail that hypothetical because it saw no reasonable possibility whereby school indemnity selections could fall within the classification requirements of Section 7.

Nevertheless, the lower court did quote, with clear approbation (586 F.2d at 763, 765 and 772), the trial court's Finding of Fact No. 12 and Conclusion of Law No. 7, which are self-explanatory, and which constitute an effective rejection of the Secretary's "comparative value" criterion even if he could "classify" school indemnity selections under Section 7:

> *Finding No.* 12: The Taylor Grazing Act was amended in 1936 by Public Law No. 827, Act of June 26, 1936, 49 Stat. 1976 *et seq.* Section 7 of the 1936 Amendment, now codified as 43 US.C. §315(f), describes the Secretary's classification authority in the following language:
>
> > . . . the Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . .

The lands selected by Utah, as identified in Finding No. 4 above, are located within grazing

districts. But there is nothing in the legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act to suggest that classification by the Secretary is a prerequisite to the exercise of school indemnity selection rights by the States. If, however, such classification should be deemed to be a prerequisite to school indemnity selection, there are no statutory criteria for classification of school indemnity selections beyond a required determination as to whether the selected lands are proper for acquisition in satisfaction of indemnity selection rights. In particular, there is nothing in Section 7 or the underlying legislative history to suggest that the Secretary is authorized or empowered to utilize public interest criteria, or to compare the value of lost base lands with the value of indemnity selections, as part of any classification procedure.

Conclusion No. 7: Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Conclusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act. (586 F.2d at 765).

V. THE TAYLOR GRAZING ACT IS INAPPLICABLE TO SCHOOL INDEMNITY SELECTIONS

A. *Inapplicability of the Taylor Grazing Act of* 1934

The Taylor Grazing Act was enacted by Congress in 1934 as H.R. 6462, Public Law No. 482, of the 73rd Congress, Second Session, Act of June 28, 1934, 48 Stat. 1269, now codified as 43 U.S.C. §315 *et seq*. There is no conceivable way in which the Taylor Grazing Act of 1934 can be construed to confer upon the Secretary of the Interior authority to "classify" lands within a grazing district as a condition precedent to the selection of such lands by a State as indemnification for lost school lands.[14]

[14] The Secretary repeatedly makes claims in his Brief with respect to his alleged authority, or with respect to statutory construction, that are either misstated or overstated. For example, at pp. 13-14, the Secretary declares:

> The court of appeals in the present case has suggested that under the amended statute, the Secretary is obliged to approve Utah's indemnity selections of mineral land, if he determines that the lost school sections were also mineral. This is incorrect. The 1958 amendments did not affect the Secretary's discretion under Section 7 of the Taylor Grazing Act; they merely expanded the set of public lands among which the states may choose in making their in-lieu selections.

The foregoing quote is misleading because it flatly declares that the holding of the Court is "incorrect", when in fact the Secretary simply disagrees with the lower courts construction of the Taylor Grazing Act.

Another illustration is the use of ipse dixit, such as that on pp. 34-35 of the Secretary's Petition, wherein it is said that ". . . although the Taylor Grazing Act refers only to withdrawal from 'all forms of entry or settlement,' the latter phrase is properly construed to comprehend school-grant indemnity selections." The Secretary does not say why the latter phrase is properly construed to include such indemnity selections.

There is nothing in the language of the Act itself, or in its legislative history, that remotely suggests that it is to have any application to state school indemnity selections. The Taylor Grazing Act of 1934 was entitled:

> AN ACT To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. (48 Stat. 1269).

A careful reading of the entire Act reveals that it was in fact designed to control and regulate grazing on the public lands. Section 7 of the Act—the provision which the Secretary cites as the source of his "classification" authority—provided in pertinent part that:

> . . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry . . . . (48 Stat. 1272).

The above provision is entirely clear. The Secretary was authorized and required to classify lands located within grazing districts established under the act before such lands could be opened to entry for homesteading. In so doing, the Secretary was guided by a basic criterion—whether the land under examination

had a higher and more beneficial use for the production of crops (homestead use) than for livestock grazing of native grasses and forage plants (the grazing use if the land was retained in federal ownership). The clear congressional instruction was that lands within grazing districts should be classified for homestead entry if their potential for agricultual crops exceeded their value for grazing, and to deny such classificaion if grazing appeared to be the more valuable use. This statutory language could not be construed to authorize or require the Secretary to classify lands within a grazing district as a condition precedent to selection by a State in satisfaction of its school indemnity rights. The Secretary had no authority under the 1934 Act to classify lands for any use or purpose other than grazing or homesteading.

B. *Inapplicability of H.R.* 3019 *and S.* 2539 (1935)

The Secretary has been unable to find any legislative history to support his argument that he has authority under Section 7 of the Taylor Grazing Act to classify lands for disposition for school indemnity, and has therefore turned to some legislative history of a bill that never became law. (Secretary's Brief, pp. 45-48). That bill was introduced in Congress in 1935 as H.R. 3019 and S. 2539, and would have amended the Taylor Grazing Act, but received a pocket veto by the President.

Even so, it appears that the Secretary misperceives the controversy that surrounded the 1935 Bill. The concern was with state exchanges—not school indemnity

selections. It is entirely clear that Congress understood in 1935 that school indemnity selections were exempt from the Taylor Grazing Act. Some background events will illustrate this controversy.

On October 25, 1934, Nathan R. Margold, Solicitor of the Department of the Interior, issued an Opinion concerning the authority and discretion of the Secretay of the Interior when acting on exchange applications filed by States pursuant to Section 8 of the Taylor Grazing Act as enacted in 1934 (found at pages 62-64 of the Hearings on S. 2539 before the Committee on Public Lands and Surveys, United States Senate, 74th Congress, 1st Session, June 12, 1935 (hereinafter referred to as Committee Hearings)). Solicitor Margold ruled that under Section 8 the Secretary had the same measure of discretion with respect to both private exchanges and state exchanges, and that in both cases he was authorized to consider the "public interests" in deciding whether to approve or reject proposed exchanges. Section 8 provided with respect to private exchanges that (1) The Secretary was to consider the "public interests" of the proposed exchanges, and (2) federal lands to be traded in exchange for private lands could not exceed the value of the private lands. Later in Section 8, speaking with respect to state exchanges, the statute provided that such exchanges should be "in the manner provided for exchange of privately-owned lands in this Section." It was that language which led Solicitor Margold to reach the conclusion explained above.

About one month later, on November 26, 1934,

President Roosevelt issued Executive Order No. 6910, which temporarily withdrew all of the unreserved and unappropriated public land in several Western States, including Utah, from "settlement, location, sale or entry" and reserved such land for classification to determine the most useful purposes for such land. This Executive Order was issued pursuant to the Pickett Act, 43 U.S.C. §141, and the Taylor Grazing Act, 43 U.S.C. §315a, *et seq*.

The Department of the Interior took the view that Executive Order No. 6910 prevented state exchanges, and so that Order was amended on May 20, 1935, by President Roosevelt, "to authorize the Secretary of Interior, in his discretion and in harmony with the purpose of said Act of June 28, 1934, to accept title to base lands *in exchange* for other land subject to such *exchange* under the terms of the Act." (Emphasis added). It is interesting to note that the President issued this Amendment only five days after the Senate commenced hearings on S. 2539 and began to hear the complaints of the States.[15]

Thus, in summary, under the Amendment to Executive Order No. 6910, state exchanges were clearly authorized in the "discretion" of the Secretary, and under Solicitor Margold's Opinion of October 25, 1934, the Secretary was not obligated to approve state exchanges but was to determine in his discretion whether such exchanges should be approved after considering the "public interests" as he perceived them. Solicitor

[15] Nowhere does the Secretary of the Interior mention the May 20, 1935 Amendment to Executive Order No. 6910.

Margold's Opinion and Executive Order No. 6910 met with much disfavor in the public land States because of the difficulty in making land exchanges—as distinguished from school indemnity selections—and this was the controversy that highlighted the hearings on H.R. 3019 and S. 2539.

Arthur H. King, Register of the State Board of Land Commissioners of Colorado, appeared before the Senate Committee on Public Lands and Surveys on June 12, 1935, when S. 2539 was being discussed. He explained that he had just learned of the May 20, 1935, Amendment to Executive Order No. 6910:

> *Mr. King*. I have just been advised that the President's Executive Order withdrawing these lands has been modified to such an extent that it will allow exchanges to be made wit (sic) the States. So, there is only one remaining thing, and that is the procedure by which this exchange may be made.

Committee Hearings on S. 2539, p. 46, June 12, 1935.

Mr. King then explained that the only concern that prompted him to appear before the Committee was the problem of state exchanges, and Senator Alva B. Adams of Colorado made clear that such exchanges were intended to be mandatory on the part of the Secretary:

> *Mr. King*. That is my only object in appearing here today, gentlemen, is that the exchange, if upon application by the State, shall be made without referring it to a stock growers' association or someone else as to whether it is proper to do so.

> *Senator Adams. I want to say for you and for the record that if it had not been for that interpretation and that language, the bill would never have passed. I want to say for the benefit of those concerned with the administration, who are in this room, that they should know that if there had been any doubt as to whether the exchange of these lands upon application by the State was discretionary with the Secretary of the Interior the bill would never have passed the Senate.*

Committee Hearings on S. 2539, p. 49, June 12, 1935 (emphasis added).

Senator Adams also expressed his displeasure with Solicitor Margold's opinion:

> *Senator Adams.* I have not a bit of patience with that, and it is utterly in conflict with what the Interior Department was intended to be authorized and directed to do, and Mr. Poole and those here know that is what the committee intended to do; and had they known that this interpretation was going to be placed upon it, it would never have passed.

Committee Hearings on S. 2539, p. 49, June 12, 1935.

Rufus G. Poole, Assistant Solicitor of the Department of the Interior, and Senator Robert D. Carey of Wyoming had the following dialogue concerning the Margold Opinion:

> *Senator Carey.* Have you the opinion there?
>
> *Mr. Poole.* Yes sir; I have. Before I turn it over to the reporter I desire to make a few comments on it, if I may.

> *Senator Carey.* When were these regulations issued for the exchange of State lands; how long ago?
>
> *Mr. Poole.* I will have to look at the date. It was February 8, 1935.
>
> *Senator Carey.* You have made no exchanges?
>
> *Mr. Poole.* No; there have been none made.
>
> *Senator Carey.* You stated this morning, I think, that you recognize the right to select its lands anywhere by the State?
>
> *Mr. Poole.* That is correct. It is so provided within the rules and regulations. The States may select either within the district or outside the district.
>
> *Senator Carey.* Do you interpret it also that the State may select lands when a district has not been granted? They could only select lands in return for those lands which might be in a district if it is created, is that it, if it was occupied?
>
> *Mr. Poole.* No. Even in the absence of the creation of any district they will be permitted to go ahead with their exchanges.
>
> *Senator McCarran.* Who would be permitted, for the clarification of the record?
>
> *Mr. Poole.* The States would be permitted to consummate their exchanges.
>
> *Senator Carey.* In other words, they have a right to exchange any of their land for any Government land providing the values were equal; is that correct?
>
> *M. Poole.* That is correct.

Committee Hearings on S. 2539, p. 64, June 12, 1935.

Later in the Hearings, Assistant Solicitor Poole and Senator McCarran of Nevada further discussed Solicitor Margold's Opinion, and Poole seemed to agree more with the Senate Committee than with Solicitor Margold:

> *Mr. Poole.* Now, I wish to read and comment again briefly on the opinion which was rendered by the Solicitor on October 25th, with reference to exchanges with the States. It was my privilege to sit in executive session when the exchange section was under consideration.
>
> *Senator McCarran.* Executive session with whom?
>
> *Mr. Poole.* The Public Lands and Surveys Committee. *And it was certainly my understanding at that time that that provision was meant to be mandatory insofar as it was possible, despite the fact that the question of value was one to be determined by the Secretary . . .*
>
> *Senator McCarran.* Who rendered that opinion?
>
> *Mr. Poole.* The Solicitor of the Interior Department, Mr. Margold.
>
> . . . .
>
> *Senator Carey. That would mean that the Secretary could use that as a reason for not making exchanges, would it not; that is, he could say it was not in the public interest to make it, so that it leaves it with your discretion, with the Secretary?*
>
> *Mr. Poole. It would leave the question of public interest up with him for determination.*

Committee Hearings on S. 2539, p. 69, June 12, 1935 (Emphasis added).

Arthur H. King, Register of the State Board of Land Commissioners of Colorado, was again assured by Senator Alva B. Adams of Colorado that Solicitor Margold's Opinion on state exchanges was contrary to the intent of Congress when the Taylor Grazing Act was passed in 1934:

> *Senator Adams.* I may say this to you, Mr. King: With all due respect to whatever Mr. Margold may have said, that *it was the intention of those who drafted this clause in the bill that so far as State exchanges were concerned it was to be mandatory. It was therefore so put in the bill, and that was the understanding of every member of the Public Lands Committee. . . . Now, that was perfectly plain to the members of the committee when that was put in.*
>
> *Mr. King.* I think, Senator, that is contrary to the opinion of Solicitor Margold.
>
> *Senator Adams.* I do not care. You know who is the final authority in this matter. Congress is the final authority, and we can very readily make this so that the solicitor will understand it.
>
> *Senator Carey.* We can clear it up.
>
> *Senator Adams.* Yes; if there is any doubt about it.

Committee Hearings on S. 2539, pp. 42-48, June 12, 1935. (Emphasis added).

Commissioner King of Colorado also discussed with several senators the practice of the Interior Department concerning exchanges proposed prior to the May 20 Amendment:

Senator Costigan. Commissioner King suggested that the law be constituted as mandatory in form.

Senator McCarran. Just what does that mean, please?

Mr. King. It means if we apply to have these lands exchanged that no one will stop us, except the proposition that we cannot get together on a valuation basis.

Senator McCarran. I understand.

Senator Adams. Have you made application for exchange?

Mr. King. We have not. We were given to understand first that the withdrawal did not permit an exchange, there was no land to select.

Senator Adams. Who told you that?

Mr. King. That has been the case.

Senator Adams. I say who told you that? I wondered who was repealing the law, that is all I am interested in.

Mr. King. The President's Executive order withdrawing this land.

Senator Adams. I know, but who told you you could not make application?

Mr. King. You can make application.

Senator Adams. They told you it would not do any good?

Mr. King. They did not tell us it would not do any good, but they said that no action would be taken on it. This land was withdrawn, but I understand recently the President's order has been modified to allow these exchanges.

Senator O'Mahoney. But that still does not answer Senator Adams' question as to who told you by reason of the President's Executive order the exchanges could not be made?

Mr. King. I would not want to answer that definitely without looking up the correspondence on it.

Senator McCarran. Is it not true that the statement in general substance has been given out to those who have held meetings throughout the country?

Mr. King. It is.

Senator McCarran. And when I say meetings throughout the country I mean meetings in the several sections of the country bearing on the Taylor Grazing Act.

Mr. King. That has been the information given out, that they could not be exchanged because the Executive order withdrew everything.

Senator Adams. Mr. King, you know Congress still has some authority, and this act specifically directed the doing of these things and there is not authority, in my judgment, for an Executive order to affect it.

Mr. King. That is true, Senator, except if there is nothing to trade for.

Senator O'Mahoney. There was everything to trade for.

Senator Adams. They had every bit of land the Government owned with the public domain, within or without the grazing area. That is what the statute says.

Committee Hearings on S. 2539, pp. 50-41, June 12, 1935.

The most meaningful summary of problems and concerns which had arisen under the administration of the 1934 Act was contained in a formal report of the Resolutions Committee of the State Land Board Commissioners of the Western Public Land States. That Committee convened in Denver, Colorado, on February 11 and 12, 1935, at the request of Secretary of the Interior Harold I. Ickes. The Committee prepared a formal report containing fifteen resolutions, and was signed and submitted by representatives of eleven States: Arizona, California, Colorado, Montana, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

The Report of the Western Public Land States was presented to the Senate Committee by Le Grand Patrick, Deputy Commissioner of Public Lands of the State of Wyoming, and appears at pages 29-33 of the Committee Hearings. Mr. Patrick, by way of introduction, explained:

> The principal thing we are interested in, of course, is section 8, providing for the exchanges of our own land, and since I have come to Washington I have learned that the Executive order provides for such exchanges.
>
> *Senator O'Mahoney.* You mean the Executive order of May 20?
>
> *Mr. Patrick.* Yes; the Executive order of May 20, as modifying the withdrawal to the extent we can go ahead.

Committee Hearings on S. 2539, p. 29, June 15, 1935.

A careful reading of the entirety of the Report and Resolutions of the Western Public Land States clearly reveals that the problems and controversies under the Taylor Grazing Act were concerned exclusively with exchanges, and not with state indemnity selections. As a preface to the Resolutions, the Western Public Land States made the following statement:

> We, the undersigned representatives of State land boards from the western States, called together by Hon. Harold I. Ickes, Secretary of the Interior, in public meetings held at Denver, Colo., on February 11 and 12, 1935, to consider the administration of the Taylor Grazing Act, do hereby most respectfully set forth certain facts, circumstances, opinions, conclusions, and requests with regard to the relation of the Taylor Grazing Act to the land grants previously made by the United States to these western States for the support of public schools and for other State purposes:
>
> Upon the admission of the several western States into the Union, large areas of land were granted to these States by the United States for the support and maintenance of public schools and for other State purposes. The lands were granted for well-defined purposes and upon certain conditions expressed and implied in the grants. These various land grants were accepted by the respective States upon the terms and conditions on which they were made. The granting by the United States and the acceptance by the several States became contracts valid and binding upon both parties. In accordance with the intent and purposes of the various grants, the State courts have held that the lands do not belong to the States out and out, but that the States

> are trustees for the real beneficiaries of the grants, that is, for the public schools and other State institutions.

Committee Hearings on S. 2539, pp. 29-30, June 15, 1935.

The Report then goes on to explain that there may be a basic conflict in concept between management of school lands and federal lands located within grazing districts, because the school lands were intended to be utilized in such a manner as to derive maximum revenue for the support of the public schools, whereas lands placed within grazing districts were to be managed for certain conservation purposes rather than for maximum revenue production. For that reason, the States wanted to have the right to exchange original school grants in place that were located within grazing districts for lands outside of grazing districts.

All of the Resolutions proposed by the Western Public Land States dealt with problems related to such exchanges, and the basic theme was that Section 8 of the 1934 Act should be amended so as to make it mandatory that the Secretary of the Interior approve exchanges proposed by the States. However, and most significantly, the Western Public Land States had no objections or complaints with respect to school indemnity selections, since Resolution No. 10 of that Report clearly recited that school indemnity selections for quantity grants were exempt from the Taylor Grazing Act by virtue of Section 1 thereof, and requested Congress to continue this exemption in force and effect, in order

to protect the States' rights in school indemnity selections:

> 10. That we desire and respectfully represent that section 1 of the Taylor Act should be literally construed in all its parts, but particularly as to the status of the grazing districts as a "reservation." The language of the act is plain and unequivocal that—
>
> "Nothing in the Act shall be construed in anyway to diminish, restrict, or impair any right which has been heretofore initiated under existing law validly affecting the public lands, and which is maintained pursuant to such except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any state . . ."
>
> That several of these signatory States have thousands of acres remaining in their quantity grants which have not been satisfied, and that if contrary to the language of the Taylor Act, the grazing districts are classed as a "reservation" of the class and effect of the national forests, and others, no land will remain for selection, and the remaining portions of the quantity grants will, in effect, be canceled. The purposes for which they were made by the National Congress would thereby be defeated, and the beneficiary schools and colleges and other public institutions would suffer severe pecuniary damage.

Committee Hearings on S. 2520, p. 22, June 15, 1935.

As will be seen, Congress in 1936 did amend Section 8 of the Taylor Grazing Act so as to make state exchanges manadatory. Those exchanges are exempt

from the classification requirements of Section 7 of the Act. It seems clear beyond question that if there had been any problem with the States consummating their school indemnity selections after the 1934 Act, Congress certainly would have provided appropriate protection to school indemnity selection rights in 1936 when it amended that Act, just as it did with respect to exchanges. But there was no need to address any question of school indemnity selections, because it was the understanding of Congress and all of the Western Public Land States in 1934, 1935 and 1936 that Section 1 of the 1934 Act provided an absolute exemption for any lands that were or would be "a part of any grant to any state."

C. *Inapplicability of the* 1936 *Amendment to the Taylor Grazing Act*

1. *Legislative History of the* 1936 *Amendment*

Representative Taylor of Colorado was the sponsor of the original Taylor Grazing Act of 1934,[16] and when his bill (H.R. 6462) was originally introduced in 1934 it purported to authorize 173,000,000 acres of public domain to be included within grazing districts so that the public range lands could be regulated, managed and protected. The bill was amended, however, and the final enactment reduced the allowable acreage to a maximum of 80,000,000 acres (see Section 1 of 48 Stat. 1269).

[16] Between 1908 and 1932 twenty-three separate bills were introduced in Congress to regulate grazing on the public domain. Representative Colton and Senator Smoot of Utah introduced a number of these bills. Not one of these twenty-three bills ever suggested that school indemnity selections would be restricted, impaired or affected in any way.

Then, in 1936, Representative Taylor introduced H.R. 10094 in the 74th Congress, Second Session, to increase the allowable acreage within grazing districts by amending Section 1 of the 1934 Act, and this bill was enacted into law as the 1936 Amendment to the Taylor Grazing Act (49 Stat. 1976). But, before examining the specific language of the 1936 Amendment, Representative Taylor's explanations on the floor of the House as to the purpose of H.R. 10094 are illuminating:

> I want to digress a moment to say that the original bill as I introduced it [referring to H.R. 6462, which became the 1934 Act] applied to all of the remaining vacant, unappropriated, and unreserved land of the public domain of the United States, at that time estimated at 173,000,000 acres, and the bill passed the House in that form. One of the hamstringing amendments added by the opponents of the bill during 3 months' debate in the Senate reduced the acreage to which the law could be applied to 80,000,000, leaving the remaining half of the public domain open to free exploitation, as it has been ever since.
>
> Realizing the ruinous absurdity of this condition and the inevitable and rapid destruction of the remaining unprotected public land, the chairman of the Public Lands Committee of the House, Mr. De Rouen, of Louisiana, at the opening of Congress in January 1935, introduced a bill making all public land subject to the provisions of this grazing-district law. The opponents of the law again loaded that bill with so many injurious amendments that the President was compelled to and did veto it.
>
> Soon after the opening of this session of Congress I introduced another bill (H.R. 10094)

merely amending the Taylor Grazing Act by increasing the amount of public lands, subject to its provisions, from 80,000,000 acres to 143,000,000 acres and making no other change in the law—just changing the figure 80 to 143. The bill passed the House unanimously March 16. It remained peacefully in the Public Lands Committee of the Senate from that time until last Monday, the 15th of June, when it was reported out with five riders amending other sections of the law and adding a new section.

While I somewhat doubt if any of these proposed new provisions should or could pass either the Senate or the House on their own merits in an independent bill, nevertheless I hope the bill will pass even in that form and become a law before this session of Congress adjourns. Otherwise the remaining public domain that is not already practically destroyed will very soon be utterly ruined by overgrazing and tramping out all the verdure on it. (Cong. Record, Vol. 80, Part 10, 74th Cong., Second Sess., House of Rep., June 19, 1936, at pp. 10281-82).

There is no further explanation in the proceedings in the House of Representatives to shed any light on the meaning intended by the amendments added by the Senate. Representative Taylor had earlier explained the purpose of his bill (H.R. 10094) on the floor of the House on March 16, 1936:

Mr. Taylor of Colorado. Mr. Speaker, the object of this bill is to bring all the remaining public domain under the provisions of the Taylor Grazing Act that was enacted into law June 28, 1934 (48 Stat. 1269). The way the bill passed the House in the spring of 1934 it applied to

all the remaining public domain in the United States. The bill was amended in the Senate limiting its application to only 80,000,000 acres of vacant, unappropriated, and unreserved lands of the public domain. This bill only changes one word in that law. It extends that limitation of 80,000,000 to 143,000,000 acres and will enable all the Western States to come in and put all of their remaining public lands under this law if they desire to do so.

Mr. Greever. I should like to ask the gentleman, Is the bill properly safeguarded so that the rights of the States to exchange their lands for lands of the United States are preserved?

Mr. Taylor of Colorado. This bill makes no change whatever in the existing law except in one word. It changes eighty to one hundred and forty-three. That is in the first section of the present law. (Cong. Record, Vol. 80, Part 4, 79th Cong., Second Sess., House of Rep., March 16, 1936, at page 3815).

The legislative history of H.R. 10094 in the Senate sheds relatively little light on the intended meaning of the 1936 Amendment. On June 15, 1936, Senate Report No. 2371 was ordered to be printed by the Committee on Public Lands and Surveys, 74th Cong., Second Sess., and that report declares, with respect to Section 7, that:

It is proposed to amend section 7 of the Taylor Grazing Act so as to provide a more practical and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing.

The next to the last paragraph of that Report, as it appears on page 3, summarizes the intended effect of H.R. 10094 in the following language:

> It should be understood that the raising of the limitation will not impair any of the other provisions of the law. Exchanges of State or privately owned land can be continued.

Just four days later, without any intervening discussion or debate, the bill was passed without objection or discussion. Senator Adams said:

> Mr. President, I ask unanimous consent for the immediate consideration of House bill 10094. A few moments ago I endeavored to secure unanimous consent for its consideration, but the Senator from Oregon [Mr. McNary] then said he would not permit consideration of any legislation until the general unanimous-consent agreement had been carried out. He said there was no objection to the bill except that he did not want to interfere at that time with the program. *There will be no discussion about the bill.* It is important that it should go to the House and have an amendment concurred in there.

There was no objection and unanimous consent was given for consideration of the bill, and:

> The amendment was agreed to. The amendment was ordered to be engrossed and the bill to be read a third time. The bill was read a third time, and passed. (Cong. Record, Vol. 80, Part 10, 79th Cong., Second Sess., Senate, June 20, 1936, at pp. 10479-80; Emphasis added).

There is no further legislative history, either in the House or the Senate, that offers any further illumination as to the meaning intended by Congress in the 1936 Amendment to Section 7 of the Taylor Grazing Act. Even though the legislative history of the 1936 Amendment is rather slim, it is absolutely clear that every word and every reasonable implication of that history makes clear that the Amendment was intended to be confined to the basic purposes and scope of the original Act of 1934[17]—and there is not the slightest justification for supposing that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the 1936 Amendment

As a point of marginal interest, Section 8 of the 1936 Amendment (43 U.S.C. §315g) did make state *exchanges* mandatory and thus deprived the Secretary of the Interior of the discretion that Solicitor Margold had said he held in the October 25, 1934, Opinion.

2. *Text of the* 1936 *Amendment*

It will be noted that Section 7 (43 U.S.C. §315f) recites that the Secetary is authorized to classify lands within a grazing district to determine whether such lands are:

> . . . proper for acquisition in satisfaction of any outstanding *lieu* . . . rights or *land grant*, and to open such lands to . . . *selection* . . . for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to disposition . . . until after the same have been classified and opened to entry . . . . (Emphasis added).

[17] See Section V.B of this Brief for explanation as to why Section 8 was amended to make state exchanges mandatory.

It is the above language that is relied on by the Secretary as his source of authority for classifying land prior to the exercise by a State of its school indemnity selection rights, and that matter will now be examined.

3. *Reasons Why the 1936 Amendment is not Applicable to School Indemnity Selections*

There are a number of compelling reasons why the 1936 Amendment should not be construed so as to authorize or require the Secretary of Interior to classify lands within a grazing district as a condition precedent to their selection by a State in satisfaction of school indemnity rights. Some of these reasons are summarized below:

a. *Express Exemption for School Indemnity Selections*

The 1936 Amendment to the Taylor Grazing Act did not amend the exemptions contained in Section 1 of the 1934 Act, and those exemptions (43 U.S.C. §315) include school land grants:

> *Nothing in this chapter shall be construed* in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validity affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor *to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State*, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. (Emphasis added).

Thus, it is clear that nothing in the Taylor Grazing Act is to be construed as "affecting" the disposition of any land that would be a part of any grant to any State. It has already been shown that school indemnity lands are express "grants" to the States. Indeed, Section 6 of the Utah Enabling Act, 28 Stat. 107, provided that Utah's school indemnity lands "are hereby granted to said State for the support of the common schools", and 43 U.S.C. §851 provides that school indemnity lands "are hereby appropriated and granted".

It seems beyond dispute that school land grants are beyond the reach of the Taylor Grazing Act, and the only relevant question would seem to be whether there is some other provision in that Act which expressly contradicts the exemption for "any grant to any State." As will be seen, there is no such contradiction.

b. *Classification Required Only for Private Entries*

As already noted, Section 7 of the 1936 Amendment contains the language relied on by the Secretary as his sole source of authority for classifying school indemnity selections to release them from the "locked up" status they allegedly acquired by being withdrawn for classification by Executive Order No. 6910. But that language of the Act clearly seems to apply only to private rights and entries on the public domain. The relevant language in Section 7 provides that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

> . . . proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to

> open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . . *Such lands* shall not be subject to disposition . . . *until after the same have been classified and opened to entry* . . . . (Emphasis added).

It thus cannot be questioned that Congress intended the classification procedure to be a condition precedent to "entries" on the public lands; and it is difficult to see how "entries" can reasonably be construed to include land grants to the States, particularly in view of the express exemption in Section 1 of the Act. A careful reading of the entire text of Section 7 suggests that Congress was concerned with *private* entries, since the primary focus was on homestead entries —even though the Act, as amended in 1936, is broad enough to include any private "lieu, exchange or script rights or land grant"

The references to "lieu" rights, the process of "selection" of lands, and "land grants" under other statutes cannot reasonably apply to school indemnity selections. Many federal statutes have made *land grants* to private persons and entities, and have provided for *selection* of *lieu* lands by such private persons and entities. Illustrative examples would be the lieu selection rights of railroads under 43 U.S.C. §§888, 890; 25 U.S.C. §334 (selection rights of Indians not residing on reservations); 43 U.S.C. §149 (private rights of selection when private lands are included within an extension of an Indian Reservation); and 43 U.S.C. §274 (selection rights of veterans). Further, it will be remembered, Solicitor Margold in his Opinion of October 25, 1934,

referred to state exchanges under Section 8 as "lieu selections." Thus, it is clear that the pertinent language in Section 7 of the Taylor Grazing Act refers to land grants, lieu rights, and selection procedures as they pertain to *private* persons and entities, as distinguished from the rights of the States to make school indemnity selections.

This conclusion is reinforced by the fact that Section 7 made an express exemption for "locations and entries under the mining laws . . . ." Mining locations are, of course, private entries, and they are the only *entries* exempted by Section 7. It must be remembered that Section 1 of the Act exempted school land grants *from the entire reach of the Act*, whereas Section 7, which deals only with classification, exempted mining locations *from the classification requirements of the Act*. It is conceivable that if Congress had not exempted school land grants from the Act under Section 1, there might have been some justification for providing such an exemption under Section 7 from the classification requirements. But, since Section 1 had already exempted school land grants from the Act, and since Section 7 extended only to private "entries" on public lands, it would have been illogical to have made a further express exemption of school land grants under Section 7.

It would thus seem to be crystal clear that Section 7 requires classification only for *private* "entries" on the public domain, and that no disposition may be made of the public domain until the land has first been classi-

fied and "opened to entry." While no further support for this conclusion is needed, it does not seem to be amiss to note that Congress expressly explained that Section 7 was to apply only to *private* entries:

> It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available *for private entry* lands which are more valuable for other purposes than grazing. (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at page 2; Emphasis added).

It is of significance that the above quotation is from the legislative history of the 1936 Amendment, which the Secretary relies on exclusively as his source of authority for classifying school land grants under Section 7.

In brief summary, it may be said that:

(1) Section 1 of the Taylor Grazing expressly exempts school land grants from all parts of the Act;

(2) Section 7 requires classification of all lands within a grazing district before such land will be open to *private* entry and disposition; and this construction is further compelled because:

(a) Section 7 expressly deals with various types of private entries and expressly exempts mining claims (private entries) from classification;

(b) Section 7 expressly prohibits disposition of lands within a grazing district until the same have been classified and opened to *entry;*

(c) Congress said, in amending the Taylor Grazing Act in 1936, that the classification requirement extended only to *private* entries; and,

(d) There is not *one word*, anywhere, in the Taylor Grazing Act or in its legislative history that is inconsistent with the clear congressional intention to exempt school land grants from that Act and to require classification of public lands within grazing districts prior to *private* entry.

c. *Judicial Authority Exempts School Indemnity Selections*

There are no cases other than the decisions of the trial court and court of appeals in this case, which have ruled directly upon the question as to whether school indemnity selections are subject to classification under Section 7 of the Taylor Grazing Act, but several cases implicitly confirm that Section 7 requires classification only for *private* entries and not for indemnity selections.

For example, *Carl v. Udall*, 309 F.2d 653 (D.C. Circ. 1962), seems to hold that classification under Section 7 is required for *private* selection of lieu lands to replace lands which conflicted with an early railroad grant. Similarly, *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970), held that the Secretary had broad discretion under Section 8 of the Taylor Grazing Act in deciding whether to approve *exchanges* of land. The important point, however, is that the circuit court observed that the Taylor Grazing Act had nothing to do with school indemnity selections. It will be remembered

that *Payne v. New Mexico*, 255 U.S. 367 (1921), sustained the validity of the state's school indemnity selection under 43 U.S.C. §§851-52; and in *Lewis v. Hickel, supra,* the Court distinguished such school indemnity selections from exchanges under the Taylor Grazing Act:

> *Payne v. New Mexico* involved the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. ***However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with*** . . . . Under the Taylor Grazing Act the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (427 F.2d at 676; Emphasis added).

While the above statement is only *dictum*, it is entirely clear that the Court viewed *Payne v. New Mexico* and the school indemnity statutes as "inapposite" to the Taylor Grazing Act because the indemnity statutes conferred absolute rights if the selections were filed in accordance with applicable statutory criteria, whereas the Taylor Grazing Act conferred broader discretion on the Secretary of Interior. This is extremely significant. *Lewis v. Hickel* was decided in 1970, some thirty-four years after the 1936 Amendment to the Taylor Grazing Act. Surely if the circuit court had thought that the Taylor Grazing Act had amended, changed or otherwise affected school indemnity selection rights, then it would have said that *Payne v. New Mexico* was inapposite *because the statutes therein construed had been changed* by the Taylor Grazing Act. But the Court did not say that—it said that *Payne* was inapposite to the Taylor Grazing Act because it was decided under entirely different statutes.

Other cases illustrate exactly the same point. Thus, in *Wilcoxson v. United States*, 313 F.2d 884 (D.C. Circ. 1963), the plaintiff cited *Wyoming v. United States, supra,* in support of his right to a patent under the Isolated Tracts Act. *Wyoming v. United States,* like *Payne v. New Mexico*, had construed the school indemnity selection statutes in favor of the State to compel the Secretary of Interior to approve the state's school indemnity selection. The Court distinguished the Secretary's ministerial duty under the selection statutes from his broader discretionary authority under the Isolated Tracts Act. Speaking with reference to *Wyoming v. United States*, the Court said:

> We agree with the court below that such cases are inapposite since they arose under statutes different from the Isolated Tracts Act. ***In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights to the lands.*** Hence, the power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised. But in the Isolated Tracts Acts Congress chose a wholly different method for disposing of interests in the public domain . . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The dis-

> tinction is between a positive mandate to the Secretary and permission to take certain action in his discretion. (313 F.2d at 888; Emphasis added).

The point of present emphasis is not the range or nature of the Secretary's discretion, but, rather, the fact that the Court distinguished the *Wyoming* case on the ground that it had been decided under separate statutes which conferred absolute rights of school indemnity selection on the States if the selections satisfied the statutory requirements. Again, the *Wilcoxson* case was decided in 1963, some twenty-seven years after the 1936 Amendment to Section 7 of the Taylor Grazing Act, and if the Court had thought that the latter statute had changed the nature of school indemnity selection rights, it would have distinguished the *Wyoming* case on that ground. But it didn't! The language of the opinion is very clear to the effect that the Court considered school indemnity selection rights to be the same in 1963 as in 1921 (when the *Wyoming* case was decided).

Ferry v. Udall, 336 F.2d 706 (9th Circ. 1964), also illustrates the same point. The issue was the same as in the *Wilcoxson* case, and, in distinguishing the *Wyoming* case, the Court said:

> The Supreme Court held that the statutes constituted an offer to Wyoming, the compliance with which became mandatory once the State accepted the offer in accordance with the statutes. The discretion of the Department of Interior was limited solely to determining whether the statutory conditions had been met. (336 F.2d at 713).

Once again, if the Court had thought that the *Wyoming* case was no longer good law as a result of any change or impact arising from the Taylor Grazing Act, it would have noted that fact. But it didn't! The Court clearly indicated that in 1964 it believed the *Wyoming* case still to be of full force and effect, but distinguished it on the ground that it construed the school indemnity statutes and not the statute then before the circuit court.

Thus, while there is no square holding (other than the decisions below) to the effect that the Taylor Grazing Act has no application to school indemnity selections, the cases clearly and uniformly suggest that the school indemnity rights of the States under 43 U.S.C. §§851-52 have not been diminished or impaired, that the Secretary's range of discretion has not been enlarged, and that *Payne v. New Mexico* and *Wyoming v. United States* continue to be the controlling law with respect to the States' rights of selection and the Secretary's duty to approve the selections if they comply with the statutory criteria of 43 U.S.C. §852. And the court below expressly so held.

d. *Legislative History Confirms Exemption of School Indemnity Selections*

To put it directly, it plainly and simply is unthinkable that Congress would have intended to limit or restrict school indemnity selection rights in any way through the enactment of the 1936 Amendment. That Amendment was sponsored and supported by congressmen from the western public-land States—the very

States that depended so heavily on school land grants and indemnity selection rights. How can any reasonable mind suppose that Congress intended to weaken, restrict or limit the school indemnity selection rights *without one word, anywhere,* in any part of the legislative history that even remotely suggests or hints that such selection rights would in any way be affected? To the contrary, Representative Taylor repeatedly emphasized that the 1936 Amendment was to do nothing more than enlarge the acreage encompassed by the Act, that the rights of the States would not be disturbed or diminished, and that Section 7 as revised required classification only for private entries.

e. *Exchanges Exempt under Section* 8(c)

Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), also amended by the 1936 Amendment, authorizes *exchanges* of state-owned lands for federal lands located within a grazing district. These exchanges are exempt from classification under Section 7. It would be ridiculous to suppose that Congress would exempt such land "trades" from classification, but would, at the same time, relegate school indemnity selections to a lower status than land trades, thus requiring school indemnity selections to be subject to classification.

The final paragraph of Section 8(c) provides:

> For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The *selection* by the State of lands in *lieu* of any such protracted school sections shall be a waiver of all of its right to such sections. (Emphasis added).

The lieu selections mentioned in the above statute must be distinguished from school indemnity selections. The exchanges authorized by Section 8(c), so far as school lands are concerned, are the *original school grants in place,* where the State has received title, or is authorized to receive title at the date of survey. In short, these are school sections that *have not been denied to the State* by federal pre-emption or private entry prior to survey. They are not indemnity lands.

School indemnity selections, on the other hand, are of an entirely different character. A State is entitled to indemnity lands *only when* original school grants in place are denied to the State by virtue of federal pre-emption or private entry prior to survey. For that reason, the grant and appropriation in 43 U.S.C. §851, and the restrictions and limitations on the exercise of the grant as set forth in 43 U.S.C. §852, relate and apply only to school indemnity selections in lieu of lost school lands. And, by contrast, the exchanges of school lands in place (the original school grants) as authorized by Section 8(c) of the Taylor Grazing Act (43 U.S.C. §315g(c)), are governed and controlled by said Section 8(c).

The Secretary's applicable regulations for exchanges under Section 8(c) are found in 43 C.F.R. 2210. In particular, Regulation 2211.0-3(b)(2) provides that:

> State exchanges are not subject to the classification requirements of Group 2400 of this chapter.

In view of the fact that school indemnity lands have been granted to the States by Congress to create a solemn public trust, and in view of the language of the Taylor Grazing Act and its legislative history, it is absurd to think that school indemnity selections are subject to the classification requirements of Section 7 of the Taylor Grazing Act while land trades and exchanges under Section 8(c) are exempt. The Secretary would be hard put to advance a rational reason for such an absurd result.

By way of comparison, it might be noted that exchanges of private lands for federal lands are authorized under Section 8(b) of the 1936 Amendment, 43 U.S.C. §315g(b). With respect to these exchanges, the Secretary has rather broad discretionary authority, and must determine whether the "public interests" will be advanced by any such exchange. Private exchanges are subject to classification under 43 C.F.R. 2400.0-3(b) and 43 C.F.R. 2200. This seems to be consistent with *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970). It is also fully consistent with the arguments advanced by Utah in this Brief, particularly with respect to the obsrevation that Section 7 of the Taylor Grazing Act applies only to *private* entries, exchanges and selections.

This is to say that private exchanges under Section 8(b) are subject to classification under Section 7, but state exchanges under Section 8(c) are not. Again, the Secretary would be hard put to advance a rational basis for his argument that school indemnity selection rights should be equated with private land exchanges

by subjecting both to Section 7 classification procedures.

f. *Exchanges under Section* 8(c) *Mandatory*

The exchanges under Section 8(c) of the 1936 Amendment to the Taylor Grazing Act (43 U.S.C. §315g(c)), as discussed above, are *mandatory*, and the Secretary is obligated to approve land exchanges proposed by the States. That provision declares that whenever any State files an application to exchange state-owned land for federal land, that:

> . . . the Secretary of Interior *shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end* . . . . (Emphasis added).

Section 8 of the 1934 Act had merely provided, in substance, that exchanges of state-owned land would proceed in "the same manner" as exchanges of privately-owned land. The Senate Report of H.R. 10094, which was enacted into law as the 1936 Amendment, observed that the purpose of amending Section 8 was "to make mandatory the exchange of lands upon the application of a State owning lands within a grazing district, and otherwise to perfect the section." (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at p. 2).[18]

It would seem highly anomalous if Congress intended to *require* the Secretary to approve *exchanges* proposed by States but to confer upon the Secretary discretion either to approve or reject the States' rights

[18] See discussion in Section V.B of this Brief.

of school *indemnity selection.* Yet, Section 8 clearly directs and requires the Secretary to approve such exchanges, and the Secretary now argues that Section 7 should be construed so as to authorize him to deny school *indemnity selections* by classifying the selected land for retention in federal ownership. The result of such an argument would be that even though the Secretary would be bound to approve exchanges proposed by States, he would not be bound to approve indemnity selections to satisfy school land grant entitlements.

It is also incredible to believe that Congress would authorize the Secretary to refrain from taking any action whatsoever on school indemnity selections for nearly fifteen years, as is the case in the matter now before the Court, but would, at the same time, direct the Secretary to proceed with state exchanges "at the earliest practicable date."

As noted repeatedly above, school indemnity selections are made as a matter of right to fulfill the purpose of a solemn public trust, whereas exchanges are simply land trades which occupy a much lower status of importance and priority.[19]

[19] There are several additional elements of simple logic that suggest that school indemnity selections are exempt from classification under Section 7 of the Taylor Grazing Act. While these matters need not be developed in the text of this brief, it does seem appropriate to summarize them in this note.

First, the purpose and thrust of the classification process authorized by Section 7 of the 1936 Amendment is to determine whether lands within a grazing district are adaptable to "uses" which have a higher value than grazing. The Secretary is authorized:

> . . . to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for the production of crops than for the production of native grasses and

g. *Taylor Grazing Act should be Construed so as to Avoid Doubt as to its Constitutionality*

Courts favor that construction of a statute which does not raise doubts as to its constitutionality. The power which the Secretary seeks in order to classify school indemnity selections under Section 7 of the Taylor Grazing Act would be an absolute power to deny the vested indemnity selection rights of the States. This is so because the Secretary contends that he is empowered to classify any lands within a grazing district for

[19] **Continued**

> forage plants, **or more valuable or suitable for any other use than for the use provided for under this Act.** . . . (Emphasis added).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title; and, after acquiring title, the State may put the land to whatever use it sees fit, so long as the terms and purposes of the school trust are observed. Thus, school indemnity selections involve no "uses" for the Secretary to evaluate to determine whether such uses are more valuable than the grazing use, and for this reason the "classification" procedures of Section 7 could not apply to such school indemnity selections.

A second observation is that Section 7 of the 1936 Amendment provides that lands within a grazing district shall not be disposed of until they are classified and opened to entry. School indemnity selections are not "entries" in the traditional sense, and have never been considered to be. It is thus illogical to assume that the classification procedures of Section 7 were intended to be a condition precedent to filing school indemnity selections.

A third practical reason why the 1936 Amendment does not apply to school indemnity selections is that the Amendment only applies to "unappropriated" federal lands, and school indemnity selection lands had previously been "appropriated" for school trust purposes. Thus, 43 U.S.C. 851 clearly provides that when original school grants in place do not pass to the State because of federal pre-emption or private entry prior to survey, then:

> . . . other lands of equal acreage are hereby **appropriated and granted,** and may be selected in accordance with the provisions of section 852 of this title . . . . (43 U.S.C. 851; Emphasis added).

Section 1 of the Taylor Grazing Act, as it presently appears in 43 U.S.C. 315, provides that:

retention in federal ownership and against school indemnity selection, and that such a classification would not be subject to judicial review because it is within his absolute discretion. Needless to say, if the Secretary is accorded such a scope of discretion, as he now desires under the guise of "classification", then the selection rights of the States would amount to very little.

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[19] **Continued**

> . . . the Secretary of Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, **unappropriated**, and unreserved lands from any part of the pulic domain of the United States . . . . (Emphasis added).

Since the Secretary's administrative jurisdiction over federal lands in grazing districts is limited and confined to "unappropriated" public lands, and since Congress specifically "appropriated" all lands necessary to satisfy school indemnity selection rights prior to enactment of the Taylor Grazing Act, it necessarily follows that the Secretary has no authority to "classify" **appropriated** lands to determine whether they are suitable for school indemnity selection. The Taylor Grazing Act simply does not apply to any school indemnity lands, even though they may be located within a grazing district.

A fourth point of logic is that even if it should be assumed, **arguendo**, that the language of Section 7 of the 1936 Amendment could be torturted and strained so as to apply to school indemnity selections, it seems clear that any withdrawals or classifications under that statute would be suspect and subordinate to the prior "appropriation" of lands for school indemnity selection by virtue of 28 Stat. 107 (Utah Enabling Act) and 43 U.S.C. 851-52.

A fifth practical observation is that even if Section 7 of the 1936 Amendment to the Taylor Grazing Act could be construed as "withdrawing" or "reserving" public lands so as to require classification of school indemnity lands prior to disposition, it is clear that such lands were not "appropriated" by said Section 7. Since the States have a direct statutory right to select any "unappropriated" lands from the public domain, it is quite obvious that such school indemnity selections may be made without regard to the classification procedures (or any other provisions of) the Taylor Grazing Act. Specifically, 43 U.S.C. 852(a) provides that:

> The lands appropriated by section 851 of this title, shall be selected from any **unappropriated**, surveyed or unsurveyed **public lands with the State** where such losses or deficiencies occur . . . . (Emphasis added).

The sophism advanced by the Secretary in support of his position is that the rights of the States will not be abridged or diminished at all, because they still will have their selection rights even though the Secretary denies particular selection lists by classifying the selected land for retention in federal ownership. Thus, goes the argument of the Secretary, the States can simply file new school indemnity selections, and if these new selections are also denied by the Secretary, why, then, the States can just keep on filing and filing their indemnity selections. Even though the States might never get any indemnity lands, they will always have their selection "rights".

Every acre of land in Utah is included within a grazing district (see Federal Register, Vol. 40, No. 148, Thurs., July 31, 1976, p. 32147). This means that it would be absolutely impossible for Utah to file any school indemnity selection, anywhere, without being subject to the Secretary's alleged "classification" authority. The Secretary asserts that his scope of discretion in "classifying" selected lands is very broad, that he may consider a wide range of public interest factors in deciding upon the appropriate classification, and that if he classifies the land for retention in federal ownership it remains locked within the grasp of Executive Order No. 6910. Such administrative action would not be reviewable in the courts because there is no "law to apply" to test the legality of his decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

Thus, under the Secretary's view of his "classification" authority under the Taylor Grazing Act, he could

reject every school indemnity selection list filed by Utah during the next 100 years; the courts could never review such rejections because they would be within the lawful range of the Secretary's discretion; and Utah's public school system would be denied the trust lands "granted" by Congress upon Utah's admission to the Union.

A further practical evil that could result from the Secretary's desired scope of "classification" power and discretion is that the Secretary could "classify" for retention in federal ownership all lands in Utah except an acreage of barren, worthless, waste lands equal to the number of acres which Utah is entitled to select as school indemnity lands. And, the Secretary says, such an action would not be reviewable because he has lawful discretion to so classify; and he also says that Utah's selection rights would not be impaired or diminished because Utah would be entitled to receive substitute acreage equal to its indemnity rights.

This illustrates again the irony of the double standard advocated by the Secretary: Under Section 7, the Secretary says, he may apply an equal value criterion; and *after* he has done that, he will apply the equal acreage criterion of Section 852, regardless of value, and, he says, school indemnity rights will thus be fully satisfied.

The public school trust was created through the bilateral actions of Utah and the United States, resulting from the congressional enactment of the Utah Enabling Act and the State's response in adopting appropriate provisions in the Utah Constitution. That bilateral

compact, accompanied with the federal grant, created valuable, vested rights in the State of Utah to select school indemnity lands. The construction which the Secretary seeks of Section 7 of the Taylor Grazing Act undeniably would result in a serious and substantial impairment and diminution of the value of Utah's vested selection rights, and there certainly would be a serious question as to the constitutionality of Section 7 if it should be construed in the manner requested by the Secretary.

In *Wyoming v. United States*, 255 U.S. 489 (1921), the Court said that when a State files school indemnity selections in accordance with applicable statutory criteria, such filings:

> . . . confer *vested rights which all must respect.* (255 U.S. at 496; Emphasis added).

Further, the Court rejected the Secretary's argument that he had authority to withdraw the land from selection under the provisions of a 1910 statute, holding that such a withdrawal would be a violation of the rights of the State:

> . . . by the selection this land had ceased to be public, and . . . the act could not be construed to embrace it without working an *inadmissible interference with vested rights.* (255 U.S. at 508-509; Emphasis added).

The Court was speaking with specific reference to rights which had vested in the State upon the filing of the school indemnity selection lists, and not with respect

to school indemnity selection rights where no selection lists had been filed. It is equally clear, however, that the right of selection in satisfaction of the school indemnity grant is a vested right that may be exercised in the discretion of the State. Since all lands within Utah are within grazing districts, and since the Secretary contends that he is authorized to classify all such lands, and in his absolute discretion to deny any selection lists filed, the net result would be that Utah would have no selection rights whatsoever, but would simply have to request the Secretary, in his discretion, to allow some school indemnity selections for some lands, somewhere, within the State of Utah. It is this result that would cast a serious cloud over the constitutional validity of Section 7 of the Taylor Grazing Act if the Secretary's argument is adopted.

If two alternative constructions of a statute are plausible, and one construction would render the statute unconstitutional while the other would sustain the statute as valid, then the courts will adopt the construction that will sustain the validity of the statute. Further, if the court can find a reasonable construction of a statute that will avoid reaching a question as to its constitutionality, then that course of action will be followed (*United States v. Hayman*, 342 U.S. 205 (1952); *Barr v. Matteo*, 355 U.S. 171 (1958)).

To construe Section 7 of the Taylor Grazing Act in such a manner as to authorize or require the Secretary to classify land for disposition in response to school indemnity selections is to create a serious question as to the constitutionality of the statute; whereas if the statute

is construed so as to exempt and exclude school indemnity selections from the scope of the Act, the constitutional difficulty is avoided. Moreover, the latter alternative is the *only* plausible construction of the statute.

h. *Mineral Rights not Affected by Taylor Grazing Act*

It is absolutely clear that nothing in the Taylor Grazing Act authorizes the Secretary to classify or dispose of the *mineral estate* in federal lands. That applies to the surface estate only. Since 1897 the mineral resources of the United States have been subject to exclusive examination and "classification" by the United States Geological Survey (43 U.S.C. §31(a)).

It is absolutely clear that States are entitled to make school indemnity selections of mineral lands under 43 U.S.C. §852 if the base lands are mineral in character. It necessarily follows that the Secretary could not possess authority to "classify" school indemnity selections for disposition of the mineral estate under Section 7 of the Taylor Grazing Act. The lower court emphasized this observation at (586 F.2d at 767).

i. *School Indemnity Statutes Liberally Construed*

The lower court construed the school indemnity statutes in such a manner as to give meaning and effect to the congressional policies and purposes as set forth therein. The Secretary now urges this Court to reverse the lower court by construing the Taylor Grazing Act in an unreasonable and irrational fashion that would

frustrate and emasculate the indemnity grants which Congress made to the States.

While federal land grant statutes often are construed strictly in favor of the United States and against claimants to federal lands, that rule does not hold true with respect to school land grants. Speaking of the very indemnity provisions that are now under review, this Court said, in denying the Secretary discretion to reject a state's indemnity selection, that:

> . . . it is of further significance that this court had recognized that the legislation of Congress designed to aid the common schools of the States is to be construed liberally rather than restictively. *Beecher v. Wetherby*, 95 U.S. 517, 526; *Johanson v. Washington*, 190 U.S. 179, 183. (*Wyoming v. United States*, 255 U.S. 489, 508 (1921); see also 42 *Op. Atty. Gen.*, February 7, 1963).

j. *Summary*

At various places in its opinion the court below discussed and adopted virtually all of the arguments set forth above. Perhaps the most succinct portion of the opinion in this regard is where the court quotes with approval Conclusion of Law No. 6 of the trial court:

> *Conclusion No.* 6: The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), *cannot reasonably be construed to require classification* of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act. (586 F.2d 764-765)

VI. *RESPONSE TO MISCELLANEOUS ARGUMENTS OF SECRETARY*

A. *Alleged Congressional Acquiescence in "Classification" under Section 7*

The Secretary makes repeated claims that the decision by the court below overturns a long standing administrative practice of the Department of the Interior that has been approved by Congress (Secretary's Brief, pp. 51 *et seq.*) The "practice" is "classification" of land under Section 7 of the Taylor Grazing Act to make it available for selection.[20] This argument is not persuasive.

The most compelling observation is that the Secre-

[20] The Secretary's position with respect to the date the public domain allegedly became "locked up" and immune from school indemnity selection is not entirely clear.

In the lower court it seemed that the Secretary relied on the date of April 15, 1930, which was the date of President Hoover's Executive Order No. 5327. Before this Court, the Secretary sometimes seems to argue for the date of June 28, 1934, which was the date that the Taylor Grazing Act became law; and at other times he seems to rely on June 26, 1936, which was the date that Section 7 of the 1934 act was amended.

But most of the time the Secretary's argument seems to be that the lands became "locked up" by Executive Order No. 6910, issued November 26, 1934, under authority of the Pickett Act and for the purpose of implementing the Taylor Grazing Act; and the Secretary then argues that the 1936 Amendment to Section 7 of the Taylor Grazing Act was necessary to provide for "classification" as a key to unlock the lands withdrawn by Executive Order No. 6910.

Therefore, throughout this brief it is assumed that the date of November 26, 1934, is the date at which the Secretary claims that all of the public domain located in the twelve States named in Executive Order No. 6910 became "locked up" and unavailable for school indemnity selection.

tary's argument is totally inconsistent with the true facts of this case. The Secretary's scheme in this case is not necessarily to "classify" land for school indemnity selection, but to apply, for the first time ever, a "comparative value" criterion in the "classification" process. This would be absolutely inconsistent with and contrary to the policy and practice of the Department of the Interior for more than a century, which has been to require equal acreage rather than equal value in school indemnity selections.

At page 15 of the Secretary's Brief, it is claimed that the Department of the Interior has "adhered steadily" to the comparative value test since 1965. But this is a most dubious claim. As the Court below noted so tellingly, the Secretary of the Interior has as yet been unable to articulate the method or manner by which such a comparative value test could even be implemented. 586 F.2d at 760.

As a matter of actual practice, at least in Utah, the Department of the Interior has considered the "classification" process to be the same as the ministerial adjudication under 43 U.S.C. §852, and such classification process has included no more than a determination as to whether school indemnity selections were in accordance with the statutory criteria of 43 U.S.C. §852.[21] As a result, any classification practice by the Department of the Interior has been essentially uncontroversial until the Department's recent announcement that it was going to implement a new criterion on comparative

[21] See affidavit of Charles R. Hansen as quoted in footnote 7, page .., supra.

value, even though such a criterion would be inconsistent with the provisions of 43 U.S.C. §852.

Even so, the Secretary's claim that Congress has approved any practice of classifying land for school indemnity selection under Section 7 if the Taylor Grazing Act is highly suspect.

First, as has already been demonstrated in considerable detail, the Taylor Grazing Act has no reasonable ambiguities with respect to school indemnity selections —it simply does not apply to such selections. The lower court was plainly correct in so holding. While Utah acknowledges that courts ordinarily accord some deference to an administrative interpretation of a statute by an agency charged with administration of the statute, that rule applies only where there is a "reasonable" basis in law for the agency's interpretation. The courts will not defer to an administrative interpretation that is not reasonable:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law" . . . But the courts are the final authorities on issues of statutory construction, . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . (*Volkswagenwerk v. FMC*, 391 U.S. 261, 272 (1968); citations in quote omitted).

See also *N.L.R.B. v. Brown*, 380 U.S. 290 (1965); *Moor v. County of Alemeda*, 411 U.S. 743 (1973); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Circ. 1971).

Further, there is no persuasive indication that Congress ever really considered the Secretary's administrative interpretation of Section 7 of the Taylor Grazing Act. At pages 55-56 of his Brief, the Secretary cites two congressional committee reports which incorporate parts of letters sent by the Secretary to the congressional committees, reciting that amendments to 43 U.S.C. §852 would not change Section 7 of the Taylor Grazing Act or the Secretary's practice thereunder. But this appears to have been a perfunctory act by the congressional committees, since that issue was peripheral to the bills under consideration and there appears not to have been one word of discussion or debate—either on the floor of Congress or in committe hearings—to indicate whether school indemnity selections were or should be subject to secretarial classification under Section 7. Contrast this with the intense congressional attention and scrutiny given to school land grants and indemnification procedures, and the Secretary has advanced a very weak argument. It is entirely unreasonable to assume that Congress intended—even if it could lawfully do so—to emasculate the school trust grants without a single word of discussion or debate concerning such an emasculation.

A case which presented a much more persuasive

factual basis for judicial deference to congressional acquiescence in an administrative interpretation of a statute was recently decided by the United States Court of Appeals for the Ninth Circuit. In *United States v. Imperial Irrigation District*, 559 F.2d 509 (1977), it was held that the Secretary of the Interior's administrative interpretation of the excess lands provision (160-acre limitation) of the Omnibus Adjustment Act of 1926 was not binding or controlling on the courts. The lower court (322 F.Supp. 11) had held that an administrative decision of Secretary of the Interior Ray Lyman Wilbur, issued February 24, 1933, was binding on the court because (1) it had been followed consistently for nearly forty years, (2) the legislative history of the Omnibus Adjustment Act of 1926 supported the Secretary's opinion, (3) Congress repeatedly had been made aware of the Secretary's opinion and seemingly acquiesced in it, and (4) very substantial investments had been made by private parties in reliance on the Secretary's opinion.

Those facts and contentions were set forth in considerable detail at 322 F.Supp. 15-27. A careful review of those facts will demonstrate that there was genuine, active and repeated congressional acquiescence in the administrative interpretation. Nevertheless, the Ninth Circuit Court held that the Secretary's Opinion in 1933 was an incorrect interpretation of the law and would not be followed by the court:

> . . . The appropriate deference to be accorded an administrative construction of a statute is that a 'consistent and longstanding' interpretation of

> a Congressional enactment by an agency charged with administration of that statute is entitled to 'considerable weight' but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). (559 F.2d 509 at 439).

In short, in the Imperial Water controversy (1) a later Secretary of the Interior determined that a forty-year-old administrative opinion of a predecessor Secretary was in error and should be reversed, (2) the trial court said that the later Secretary of the Interior could not change the administrative interpretation adopted by the earlier Secretary, and (3) the Court of Appeals reversed, holding that an unfounded administrative interpretation would not be sustained by the courts, regardless of its antiquity. See annotation at 39 L.Ed.2d 952 *et seq.*

But, returning to the pertinent point, the only actual *practice* of the Department of the Interior for more than a century has been to process school indemnity selections on the basis of equal acreage rather than equal value—as required by 43 U.S.C. §852. Any so-called "classification" process under Section 7 of the Taylor Grazing Act has never departed from such equal acreage requirement. If Congress has actually approved any administrative practice of classification, it has been the practice of classifying school indemnity selections on the basis of equal acreage rather than equal value.

B. *The Pickett Act and Executive Orders No. 5327 and 6910*

The Secretary argues that the lands selected by Utah in this case were not available for selection unless "unlocked" by classification under Section 7 of the Taylor Grazing Act because all unappropriated public domain in Utah had been withdrawn in 1934—and still remains withdrawn—for classification and examination by Executive Order No. 6910, issued under the Pickett Act. The Secretary also makes an unusual claim under Executive Order No. 5327, which will be explained in a moment.

The Pickett Act of June 25, 1910, was codified as 43 U.S.C. 141 prior to its repeal in 1976, and provided as follows:

> The President may, at any time in his discretion, *temporarily withdraw from settlement, location, sale, or entry* any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (Emphasis added).

The Secretary argues that Executive Order No. 6910, made under authority of the Pickett Act, withdrew the land described therein so as to prevent school indemnity selections unless and until the land was classified as suitable for disposition under Section 7 of the Taylor Grazing Act. That order was issued by Presi-

dent Roosevelt on November 26, 1934, expressly identified the Pickett Act as authority for the order, and provided, in part, that:

> . . . it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, ...

Thus, this executive order withdrew 100% of the "vacant, unreserved and unappropriated" public land in twelve Western States, for classification "of the most useful purpose to which said land may be put in consideration of the provisions" of the Taylor Grazing Act of 1934.

The Secretary now raises two legal questions by asserting that Executive Order No. 6910 prevents school indemnity mineral selections. The first is whether the Pickett Act authorized any withdrawals that would defeat school indemnity selections; and the second is whether Executive Order No. 6910 intended to withdraw lands from school indemnity mineral selection.

With respect to the first question, it will be noted that both the Pickett Act and Executive Order No. 6910 apply *only* to withdrawals from "settlement, location, sale or entry." There is no authority to withdraw from

school indemnity *selection*. Selections are not settlements. They are not sales. They are not entries. They are simply school indemnity selections that appear to be beyond the reach of the Pickett Act and Executive Order No. 6910 promulgated thereunder. But the lower court found it unnecessary to decide whether land withdrawals by virtue of an executive order promulgated under the Pickett Act conceivably could defeat school indemnity selections, because it was entirely clear to the court that Executive Order No. 6910 sought to accomplish no such purpose.

In his Petition, the Secretary pondered the question as to what kinds of withdrawals might prevent school indemnity selection:

> What is not entirely clear . . . , however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection? (Secretary's Petition, p. 14).

In his Brief, the Secretary *assumes* that no special purpose reservation is required. But he cites only *Wyoming v. United States, supra,* to support this assumption. But that case dealt with a "special purpose" forest reservation—not with a withdrawal for classification without reservation for any federal purpose. Further, the *Wyoming* case sustained the validity of the school indemnity selection.

There can be no serious contention that Executive Order No. 6910 withdrew all of the unreserved public

domain in Utah from school indemnity selection. The Pickett Act, the source of authority for that Order, did not authorize withdrawals from school indemnity selection. Executive Order No. 6910, by its own terms, did not purport to withdraw land from school indemnity selection. Indeed, when the Solicitor of Interior ruled that Executive Order No. 6910 withdrew the public domain from *exchanges*, Congress expressed prompt disapproval, and, within five days after a Senate Committee began hearings on the Department's practice with respect to such exchanges, President Roosevelt amended Executive Order No. 6910 to make it clear that the rights of the States to trade or exchange land were unaffected by the Order. (See Section V.B. of this Brief, *supra*).

The Secretary offers a further curious argument as to why Executive Order No. 6910 might have locked up the public domain and made it unavailable for school indemnity selection. He notes that Executive Order No. 5327, issued by President Hoover on April 15, 1930, withdrew all lands containing deposits of oil shale for investigation, examination and classification, but then admits that such Order "did not effect the state indemnity selection process" because mineral indemnity selections were not authorized by Congress until 1958. (Secretary's Brief, p. 32). The Secretary's argument is that even though Congress specifically lifted this mineral withdrawal in 1958, it failed to lift the alleged withdrawal of Executive Order No. 6910. (Secretary's Brief, p. 53, n. 25). In short, the Secretary argues that the clear congressional declaration by Congress in 1958

(43 U.S.C. §852(d)(1)) that oil shale lands shall be subject to school indemnity selection actually means the exact opposite—that such lands shall not be subject to selection unless and until the Secretary says so because Congress allegedly neglected to nullify Executive Order No. 6910.

That argument is really strained, since, among other things, it is clear that Executive Order No. 6910 never applied to school indemnity selections. And the lower court was clearly unimpressed. Unable to swallow the Secretary's imaginative but fanciful arguments concerning the alleged reach, affect and relationship of Executive Orders No. 5327 and No. 6910, the lower court rejected them summarily:

> Finally, we reach the Secetary's contention that classification is likely required under Executive Order 5327 issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders can be construed to apply to state school indemnity selections. (586 F.2d at 773).

C. *Alleged "Windfall" to States*

The Secretary repeatedly claims or implies that Utah would receive a substantial windfall if the pending school indemnity selections are honored. (See, *e.g.*, Secretary's Brief, pp. 15, 57 *et seq.*). This is not necessarily so. The basic federal purpose in granting to Utah

sections 2, 16, 32 and 36 in each township was to give the State a balanced and representative ownership on a statewide basis This basic federal policy is admitted by the Secretary (Secretary's Brief, p. 14), and has always been well understood. When Congress was considering S. 2517, which became the 1958 Amendment to 43 U.S.C. §852, the Department of Interior reported to Congress that:

> In giving a State sections in place *it was intended that a State would acquire a proportionate part of all classes of land within its boundaries*, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965) (Emphasis added).

Utah was granted four sections in each township, rather than the traditional two, because of the large areas of arid, barren desert. Title could not pass until the lands were surveyed. Surveys were delayed, and, in the meantime, the Federal Government reserved the choice areas for national parks (Utah has five national parks, which is more than any other State), national forests, reservoir sites, and other purposes. Lands that were near streams, or that were susceptible to irrigation or other development, were taken by private entry. Thus, by and large, when surveys were completed the school lands *in place* actually received by Utah were the remote and barren lands that nobody wanted, ordinarily having no value except for marginal grazing, and even today much of that land is leased for less than ten cents per acre per year. While Utah could

select indemnity lands for those valuable school sections lost by pre-emption and reservation, it could only select from the remaining "unappropriated" barren desert.

And a further inequity arose in 1918 when it was judicially determined that Utah was not entitled to receive school lands in place that were mineral in character. Utah's Enabling Act contained no such reservation or exclusion, but this Court reached that result because enabling acts of several other States excluded mineral lands from school grants. *United States v. Sweet*, 245 U.S. 563 (1918). Congress recognized and remedied this inequity in 1927 by providing that school land grants in place include mineral lands. Act of January 25, 1927, 44 Stat. 1026-1027.

Even so, States still could not select mineral lands as indemnity for mineral base lands until 1958, when Congress remedied this inequity by enacting 72 Stat. 928, amending 43 U.S.C. §852. That statute contains the congressional criteria for "fair value" based on an "equal acreage" compensation in indemnity lands. Thus, for decades the Government short-changed the school land grants to the States under the bilateral compacts, but Congress in a step-by-step manner corrected these deficiencies. Congress certainly must have been aware of the fact that at times lands selected as school indemnity would exceed the value of the base lands, just as in numerous cases the value of the base lands had exceeded that of the selected lands.

When Utah was compelled to select lands as indemnity for sections in place having a value much high-

er than the selected lands, the Secretary never objected on the ground that Utah was being short-changed. Even now, under the Secretary's new policy on comparative value, he has a totally one-sided view. The Secretary desires to reject mineral land indemnity selections when the selected land is more valuable than the base mineral lands—but the Secretary is perfectly willing to approve selections where the base lands are more valuable than the selected lands—and, in that event, the Secretary seems to claim that he cannot make any adjustment to compensate the State for the federal windfall—because, the Secretary argues, once he has "unlocked" the public domain by approving lands as suitable for school indemnity selection, he then is bound by the "equal acreage" provisions of 43 U.S.C. §852.

Another odd implication advanced by the Secretary is that if land has value, it should be owned by the United States. In footnote 2 at page 4 of his Brief, the Secretary claims that there is a total of 643,000 acres of outstanding school indemnity selection rights held by seven States. This is less than one-tenth of one percent of the federal land. See *One Third of the Nation's Land, A Report to the President and to the Congress by Public Land Law Review Commission*, p. x, 1970. Utah is listed in said footnote 2 as having 225,000 acres —which assumes that none of Utah's present selections are valid. Even so, 225,000 acres represents only slightly more than one-half of one percent of the federal land in Utah—the Federal Government still owns two-thirds of the State. (*One Third of the Nation's Land, supra*, p. 327).

The Secretary asserts that the decision below "will prove quite costly to the United States." (Secretary's Petition, p. 10). To reinforce this notion the Secretary advises that Colorado "presumably" will now be able to select the lands in that State on which prototype oil shale leases have been issued and where the lessees are obligated to pay $328 milion in bonus payments. (Secretary's Petition, pp. 10-11, and footnote 7 on page 11 of said Petition). This is highly misleading.

Under the clear holding of the court below, no rights attach on the part of a selecting State prior to the date of selection, and Colorado had not selected any lands prior to issuance of the prototype leases. The Colorado lessees have already paid to the United States the full amount of the bonus bid required to be paid in cash (60%); the remaining amount (40%) may be credited against development costs, as provided in the leases. Thus, if Colorado could have selected those lands at all—and there is some question if it could—the selection could not be effective until the termination of the existing leases, and the State would not directly receive any of the lease revenues.

And the unfounded fear of the Secretary is now moot. On September 4, 1979, Colorado exercised its entire remaining entitlement of school indemnity rights to mineral land by selecting 6,840 acres of oil shale lands in Rio Blanco County. Colorado did not select any part of the land covered by the federal prototype leases.

Does the United States have to own all of the nation's oil shale resource any more than it has to own all of the nation's farms? The estimated oil shale deposits in Colorado, Utah and Wyoming consist of 11,000,000 acres. Of this, 7,870,000 acres are owned by the United States and the balance of 3,130,000 acres are owned by private parties, Indians, and the three States. The United States owns and the Department of the Interior administers 72 percent of the total oil shale *acreage*. But that is a misleading figure.

Actually, the United States owns a much larger share of the resource. The total estimated shale oil reserves in the three States are slightly more than 4 trillion barrels. However, the amount of oil that might be recovered economically is estimated to be considerably less, consisting of a total of 620 billion barrels, with 500 billion in Colorado, 90 billion in Utah, and 30 billion in Wyoming. If the School indemnity selections of both Utah and Colorado are honored, they will embrace less than one-half of 1 percent of the total estimated reserves and less than 1 percent of the high-grade reserves that might be economical to produce. The United States would still own nearly 80 percent of the high-grade oil shale. See Environmental Impact Statement for Federal Prototype Leasing Program, Vol. I, pp. II-102 *et seq.*, tables II-16, II-17 and II-18, and Figure II-31 (Dept. of the Interior, 1973); and Synthetic Fuels Data Handbook, 2d. ed., p. 13 (Cameron Engineers, Denver, Colorado ,1978).

Moreover, there is no evidence that oil shale lands are more valuable than the original grants in place. While there has been an interest in oil shale development for more than sixty years, the fact is that not one gallon of shale oil has yet been produced at a profit, and there is no assurance that one ever will be. On the other hand, land appropriated in Utah before statehood and survey (where Utah was denied title) included some of Utah's most valuable metals and hydrocarbons.

D. *The Secretary Obfuscates the Issue*

The central issue in this litigation is whether the Secretary has authority to reject school indemnity selections because the Secretary believes the selected land is more valuable than the base lands for which selection is made.

The trial court found the answer to this question to be very clear from the relevant statutes and decisions of this Court. And so did the Court of Appeals. But the Secretary has endeavored to obscure both the issue and the answer in a complicated and largely irrelevant mix and maze of miscellaneous material. Indeed, the Secretary begins his Argument (Secretary's Brief, p. 16) in the following manner:

> Resolution of the central question presented in this case requires the Court to review a complex amalgam of statutes, executive orders, judicial decisions, and administrative interpretations bearing on the state indemnity selection program. The current legal situation cannot be fully under-

stood without a review of the historical antecedents of the statutory authority that the states now enjoy to select mineral lands in certain circumstances.

Utah submits that this case is not so complicated. The school land grant program, derived from a bilateral compact between sovereigns, created a solemn public trust that cannot lightly be swept away by reference to a bunch of obscure and vague bits and pieces of the administrative practice of the Department of the Interior over a century and a half. The Secretary weaves and sutures a fabricated pattern that suggests—at the most—that the Secretary sometimes did and sometimes didn't claim authority to exercise discretion over school indemnity selections.

But after the arduous ordeal of carefully following the Secretary's legal hypotheses is over—one fact remains absolutely clear: Never—not once—during the 150 years of public land law scrutinized by the Secretary, has the Secretary applied a comparative value criterion to school indemnity selections. To this very day, every school indemnity selection in the history of this Nation has been on the basis of equal acreage.

That is the central issue in this case. That is the only issue in this case. Utah's school indemnity selections have been pending for fifteen years and the Secretary has advanced no objection other than his desire to replace the congressionally mandated equal acreage criterion with his self-created equal value criterion.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be affirmed.

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CERTIFICATE OF SERVICE

I, Robert B. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that two copies of the foregoing Brief by the State of Utah were served upon each of the following: Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; George Deukmejian, Attorney General of the State of California, 555 Capitol Mall, Suite 350, Sacramento, California 95814; David H. LeRoy, Attorney General of the State of Idaho, State House, Boise, Idaho 83720; and Frank J. Allen, Attorney at Law, Clyde & Pratt, 351 South State Street, Salt Lake City, Utah 84111, by mailing the same, postage prepaid, this 9th day of October, 1979, all in accordance with the Rules of this Court.

ROBERT B. HANSEN
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